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Supreme Court of the United States

OCTOBER TERM, 19[illegible]

No. [illegible] 28

FRANCESCO FOTI a/k/a FRANK FOTI,
PETITIONER,

vs.

IMMIGRATION AND NATURALIZATION SERVICE.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 30, 1962
CERTIORARI GRANTED JANUARY 7, 1963

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 544

FRANCESCO FOTI a/k/a FRANK FOTI,
PETITIONER,

vs.

IMMIGRATION AND NATURALIZATION SERVICE.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. A] [File endorsement omitted]

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

FRANCESCO FOTI, a/k/a FRANK FOTI, Petitioner,

—against—

P. A. ESPERDY, as District Director of Immigration and Naturalization Service, Respondent.

Excerpts From Appendix to Petitioner's Brief—
Filed February 14, 1962

[fol. 1]

BEFORE THE BOARD OF IMMIGRATION APPEALS

UNITED STATES DEPARTMENT OF JUSTICE

File: A-15724917—New York

In re: FRANCESCO FOTI a/k/a FRANK FOTI

In Deportation Proceedings

Appeal

Oral Argument: October 18, 1961

On behalf of respondent: James J. Cally, Esquire, 150 Broadway, New York 38, New York (Counsel did not appear. He submitted a brief in lieu of oral argument).

On behalf of I & N Service: R. A. Vielhaber, Esquire.

Charges:

Order: Section 241(a)(2), I&N Act (8 USC 1251(a)(2)) —Remained longer—nonimmigrant seaman.

Lodged: None.

Application: Suspension of deportation (Immigration and Nationality Act—Section 244(a)(5)).

OPINION DENYING APPLICATION FOR SUSPENSION OF ORDER OF DEPORTATION—November 28, 1961

The respondent appeals from a decision and order of the special inquiry officer dated September 19, 1961 finding him deportable under 8 USC 1251(a)(2) but granting him the privilege of voluntary departure in lieu of deportation. The order also provides for the alien's deportation in the event he fails to depart when required. Deportability on the [fol. 2] charge set forth in the Order to Show Cause is conceded. Exceptions have been taken to the denial of suspension of deportation.

The record relates to a native and citizen of Italy, male, married, 45 years of age, who last entered the United States through the port of Norfolk, Virginia on or about November 16, 1950. He was admitted as a nonimmigrant seaman

authorized to remain for a period not to exceed 29 days. The respondent has remained in the United States since his admission as a nonimmigrant seaman.

The respondent has applied for suspension of deportation under the provisions of 8 USC 1254(a)(5). The special inquiry officer finds that the respondent meets the physical presence and good moral character requirements set forth in 8 USC 1254(a)(5). His denial is based upon a finding that respondent's deportation would not result in "exceptional and extremely unusual hardship to the alien."

The respondent is married and has a wife and three children residing in Italy. He alleges that it will be difficult for him to earn a living for his family in Italy in the event he is deported. The respondent owns and operates the Nella Bakery at 7616—17th Avenue, Brooklyn, New York (Ex. 8). It is alleged that respondent's deportation would require the liquidation of his business at great financial loss.

[fol. 3] We have carefully reviewed the cases cited by counsel[1] in support of his claim that the respondent's deportation would result in exceptional and extremely unusual hardship. We find that the facts of the cited cases can be distinguished from the facts before us.

The aliens in *Matter of S—* and *Matter of Z—* (*supra*[1]) had resided in the United States continuously for 28 and 29 years, respectively, at the time they applied for suspension of deportation. The alien Z— had operated a grocery store for many years. We stated that his deportation would cause him to "probably lose his means of livelihood."

The alien in *Matter of W—* (*supra*[1]) had resided in the United States for approximately eight years—six months at the time she submitted her application for suspension of deportation. The primary hardship factor in her case was found to be the separation from her lawfully resident alien husband and five native-born children if she were deported. We noted the alien's testimony that her husband would not accompany her to the British West Indies inas-

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[1] *Matter of S—*, 5 I&N Dec. 409, BIA, 1953; *Matter of Z—*, 5 I&N Dec. 419, BIA, 1953; *Matter of W—*, 5 I&N Dec. 586, BIA, 1953.

much as he would be unable to obtain work and support his family.

The respondent herein has resided in the United States for approximately ten years—seven months as of the date he filed his application for suspension of deportation. He has no close relatives residing in the United States. His wife and family reside in Italy. While it is alleged that [fol. 4] the liquidation of respondent's bakery business will cause him substantial financial loss, we note that he entered into this undertaking after the service of the Order to Show Cause on June 2, 1961 (Ex. 8). Under the circumstances, his position is not analogous to the alien Z— (*supra*[1]) who had operated a grocery store for many years. We agree with the special inquiry officer that there are insufficient factors for a finding of exceptional and extremely unusual hardship in respondent's case.

Counsel maintains that respondent's case should be judged in accordance with the standards applicable to 8 USC 155(c) (1940 ED.) because the respondent entered the United States two years prior to the enactment of the 1952 Act and therefore is protected by the savings clause of that Act (8 USC 1101 note). The respondent's application for suspension of deportation was not pending on the date of the enactment of the Immigration and Nationality Act of 1952 and therefore does not come within the provisions of the savings clause. *Matter of S—*, 5 I&N Dec. 467, BIA, October 6, 1953.

The appeal will be dismissed.

Order: It is directed that the appeal be and the same is hereby dismissed.

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[1] *Matter of S—*, 5 I&N Dec. 409, BIA, 1953; *Matter of Z—*, 5 I&N Dec. 419, BIA, 1953; *Matter of W—*, 5 I&N Dec. 586, BIA, 1953.

[fol. 5]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

FRANCESCO FOTI, a/k/a FRANK FOTI, Petitioner,

—against—

P. A. ESPERDY, as District Director of the Immigration and Naturalization Service, New York District, Respondent.

PETITION TO REVIEW AND SET ASIDE AN ORDER OF DENIAL OF SUSPENSION OF DEPORTATION—Filed January 15, 1962

To the United States Court of Appeals for the Second Circuit:

The petition of FRANCESCO FOTI, a/k/a FRANK FOTI, respectfully shows to this Court:

First: That the petitioner is a native citizen of Italy, and presently resides in the State of New York, where he has been residing since on or about November 16, 1950.

Second: That the respondent is the District Director of the Immigration and Naturalization Service, New York District and is charged with the statutory duty to determine, after appropriate hearings, whether aliens are to be excluded or deported from the United States and whether he may grant stays of deportation upon legal grounds, and he supervises the administration of the Immigration and Naturalization Laws within the jurisdiction of this Court.

Third: That this petition is filed pursuant to Public Law 87-301 or Section 106 of the Immigration and Nationality Act, which gives this Court jurisdiction to review these proceedings.

Fourth: That since the petitioner's arrival in the United States of America, the petitioner has been engaged in the bakery business and he now owns his own business, located at 7616 17th Avenue, Borough of Brooklyn, County

of Kings, City and State of New York, and has admittedly no criminal record and has been a person of good moral character.

Fifth: That under the provisions of Section 244 of the Immigration Act of 1952 (8 U.S.C. 1254) the plaintiff is entitled to relief from deportation if he has been continuously a resident of the United States for more than ten [fol. 6] years (10) and was in this Country on or about the 16th day of November 1950, and has been a person of good moral character for upwards of five years.

Sixth: That your petitioner made an application under the said Section of the Immigration and Naturalization Laws, requesting suspension of deportation.

Seventh: That the petitioner was accorded a hearing by the Special Inquiry Officer of the respondent, wherein all the necessary facts and data were submitted to the said officer.

Eighth: That the respondent through its officer disregarded the rights of the petitioner in the premises, denying the discretionary relief to the petitioner, on the ground that a case of extreme hardship had not been made out.

Ninth: That the only evidence the respondent based its decision is the fact that plaintiff's wife and children reside in Italy and that the bakery business was purchased after proceedings were commenced against him, which is not fact, but merely a conclusion. Nevertheless, the respondent found that the petitioner had met all other requirements under the Act. The petitioner thus urges that such denial of suspension of deportation was arbitrary and capricious and an abuse of discretion, all to the detriment of the petitioner.

Tenth: That the petitioner owned another bakery business, immediately prior to the present one, and that the said business was sold and down payment had been made on the purchase of the present business, and if he had not made the transaction he would have forfeited the moneys placed on deposit for the purchase.

Eleventh: Petitioner avers that his removal from the class of persons to whom relief from deportation is made available, denies him the equal protection of the law, contrary to the Constitution of the United States, and contrary to any law authorizing or empowering the respondent to direct deportation of the plaintiff.

[fol. 7] Twelfth: Petitioner appealed from the Special Inquiry Officer's findings to the Board of Immigration and Appeals, and the findings of the said Officer were affirmed.

Thirteenth: That as a consequence of the aforesaid, a final order was made and entered by the respondent directing the petitioner to leave voluntarily by the 18th of December, 1961, or in the event the petitioner did not leave voluntarily, he would be deported.

Fourteenth: That, thereafter, and before the petitioner was to depart, proceedings were instituted in the United States District Court and that the Court has ruled that it has no jurisdiction in the light of the new statute above stated.

Fifteenth: That as a consequence thereof, the petitioner is prejudiced and will result in undue hardship and render him great harm by the loss of his livelihood, especially since he is 45 years of age.

Wherefore, the petitioner prays:

1. That this Court direct the respondent to set aside its present Order and the case re-opened to permit the exercise of the discretionary relief to which the petitioner is entitled.

2. And for such other and further relief as may be appropriate.

Cally & Cally, Attorneys for Petitioner, Office & P. O. Address, 150 Broadway, New York 38, N. Y., By: James A. Cally.

[File endorsement omitted]

[fol. 9]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 295—September Term, 1961.

Argued April 3, 1962

Docket No. 27345

FRANCESCO FOTI, a/k/a FRANK FOTI, Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE, Respondent.

Before: Lumbard, Chief Judge, Clark, Waterman, Moore, Friendly, Smith, Kaufman, Hays and Marshall, Circuit Judges.

Petition by Francesco Foti pursuant to §106(a), 8 U. S. C. §1105a(a), to review and set aside an order of the Immigration and Naturalization Service denying his application for suspension of his deportation. Dismissed for want of jurisdiction.

James J. Cally, of Cally & Cally, New York City, for petitioner.

Roy Babitt, Sp. Asst. U. S. Atty., S. D. N. Y., New York City (Robert M. Morgenthau, U. S. Atty., New York City, on the brief), for respondent.

[fol. 10]

OPINION—September 21, 1962

FRIENDLY, *Circuit Judge*:

Foti is a resident alien who entered this country on a seaman's visa and stayed illegally for ten years, leaving his wife and three children in Italy. When deportation proceedings were instituted, he conceded his deportability, but applied to the Attorney General for relief under §244 (a)(5) of the Immigration and Nationality Act, 8 U. S. C. §1254(a)(5), which provides that "the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who * * * is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien * * * *" The Attorney General, through his Special Inquiry Officer, ruled that Foti did not qualify as a case of "exceptional and extremely unusual hardship," and therefore that no ground to exercise the granted discretion arose, but permitted voluntary departure. The decision was upheld by the Board of Immigration Appeals, and Foti now seeks to have us review it under §106 of the Act, 8 U. S. C. §1105a, enacted Sept. 26, 1961, 75 Stat. 651, providing for review of final orders of deportation by courts of appeals by petition for review brought within six months.

Although the Immigration and Naturalization Service joins the petitioner in urging us to assume jurisdiction, in contrast to the position it has taken elsewhere, the matter is one that we must determine on our own account. The panel which heard the case upheld jurisdiction by a 2-1 vote, Judges Clark and Hincks forming the majority and the writer dissenting. Because of the important consequences of a decision that the recent Congressional grant to the courts of appeals of exclusive jurisdiction to review "final orders of deportation" was not in fact limited to such [fol. 11] orders, as the language of the statute would indicate, but extended also to the variety of discretionary orders withholding or suspending deportation which the Attorney General is authorized to make, this case and the companion

case of *Ng Yen* were deemed appropriate for *in banc* consideration. This has resulted in a determination, four judges dissenting, that we have no jurisdiction, the majority believing that although decision either way has its difficulties, there is no sufficient reason for expanding the words used by Congress beyond their well-understood meaning.

The text we must construe is §106, added to the Immigration and Nationality Act of 1952 in 1961, 75 Stat. 651, 8 U. S. C. §1105a. This directs, §106(a), that "The procedure prescribed by, and all the provisions of the Act of December 29, 1950, as amended (64 Stat. 1129; 68 Stat. 961; 5 U. S. C. 1031 et seq.)," providing for review in the courts of appeals of certain orders of the Federal Communications Commission, the Secretary of Agriculture, the Federal Maritime Board (and its predecessors), and the Atomic Energy Commission, "shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this Act or comparable provisions of any prior Act • • • "

Section 242 of the Immigration and Nationality Act of 1952, 8 U. S. C. §1252, sets up a comprehensive procedure to determine the deportability of an alien. Section 242(b), into which the new statute is expressly keyed, directs that "A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien," states in great detail how this shall be done, and lays down that "The procedure so prescribed shall be the sole and [fol. 12] exclusive procedure for determining the deportability of an alien under this section." This specification of procedural safeguards is immediately followed by §242(c), providing that "When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States • • • "; during that period the alien may be detained.

Section 242(d) adds that "Any alien, against whom a final order of deportation as defined in subsection (c) of this section, heretofore or hereafter issued has been outstanding for more than six months, shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General," and §242(e) imposes a criminal penalty upon "Any alien against whom a final order of deportation is outstanding by reason of being a member of any of the classes" described in certain paragraphs of §241(a) who wilfully fails or refuses to depart "within a period of six months from the date of the final order of deportation under administrative processes, or, if judicial review is had, then from the date of the final order of the court * * * " When Congress, in 1961, gave the courts of appeals jurisdiction to review "final orders of deportation * * * made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this Act or comparable provisions of any prior Act," it was thus using a term of art which had been used repeatedly in §242 and possessed a well-understood meaning. We have already decided at least two such cases, *Dentico* v. *I. N. S.*, 303 F. 2d 137 (2 Cir. 1962), and *Schoeler* v. *I. N. S.*, —— F. 2d —— (2 Cir. 1962), where a "final order of deportation" was challenged, see also fn. 3 to Judge Clark's dissenting opinion.

[fol. 13] Under the "prior Act[s]," 39 Stat. 889-890 (1917) and 43 Stat. 162 (1924), deportation, once determined, was generally mandatory. However, Congress has supplemented the deportation provisions contained in such acts and in §242 of the 1952 Act, by other provisions giving the Attorney General a wide gamut of discretionary withholding and dispensing powers. Section 243(h), 8 U. S. C. §1253(h), authorizes him "to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason." Section 244(a), 8 U. S. C. §1254(a), provides that he "may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence" in five different cate-

gories of cases.[1] Sections 244(b) and (c), 8 U. S. C. §§1254 (b) and (c), direct that when the Attorney General has so suspended deportation, he is to report to Congress. In certain instances the Attorney General is to cancel deportation proceedings unless a house of Congress votes to the contrary; in others he is to deport unless Congress passes a concurrent resolution favoring suspension or if either house passes a resolution not favoring suspension. Finally §244(e), 8 U. S. C. §1254(e), authorizes the Attorney General "in his discretion" to "permit any alien under deportation proceedings," with certain exceptions, "to depart voluntarily from the United States * * * if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure * * *" A further dispensing [fol. 14] power, subject to Congressional concurrence, is conferred by §6 of the Refugee Relief Act of 1953, as amended, 50 U. S. C. App. §1971d.

The contrast between these sections giving the Attorney General discretion to withhold or suspend the deportation of an alien found to be deportable, and §242, relating to the determination of deportability, is marked. "The procedure outlined for a determination by the Attorney General or his delegate whether the alien, though subject to deportation shall have the order of deportation withheld, is a different matter," *Milutin* v. *Bouchard*, 299 F. 2d 50, 51 (3 Cir. 1962), cert. granted and judgment vacated on consent of Solicitor General, 370 U. S. 292 (1962). In fact, the withholding and suspending sections outline no procedure, let alone requiring use of the procedure prescribed by §242(b), to which the 1961 judicial review amendment is keyed. Whereas a determination of deportability must rest on findings of fact sufficient to bring the alien under a specific provision of law, suspension "is in all cases a matter of grace," resting in the "unfettered discretion of the

[1] In the last four of these categories, it is a condition to relief that the alien "has not been served with a final order of deportation issued pursuant to this Act in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation."

Attorney General," *Jay* v. *Boyd*, 351 U. S. 345, 354, 357-358 (1956). Nowhere do the withholding or suspension sections use the phrase of the 1961 Act, "final order of deportation" to characterize orders made thereunder, although §244 does use it in explicit reference to deportation orders made under §242(b); these sections speak instead of withholding, suspending, or cancelling deportation when the Attorney General exercises his discretion in favor of the alien, and of ultimately deporting the alien when he does not. When the Attorney General refuses to withhold or suspend deportation under these sections, he no more "affirms" the order of deportation than a parole board "affirms" a conviction or sentence when it denies parole, *Jay* v. *Boyd, supra;* neither can the former action be fitly described as "ancillary" any more than the latter could be. [fol. 15] So far as the statute itself is concerned, it would thus seem rather plain that the Attorney General's refusal to intervene with respect to a "final order of deportation" made under §242(b) is not within the provision of the Act of 1961 for direct review of "final orders of deportation" by courts of appeals. To be sure such orders may be nearer the end of the procedures an alien may invoke prior to deportation, but on that view the warrant itself would be the "final order"—a position maintained by no one. When Congress, in 1961, defined its purpose by using a term having a meaning well understood in practice and repeatedly employed in the Immigration and Nationality Act itself, Congress must be taken to have adopted that meaning—at least in the absence of the clearest proof to the contrary. Yet, since the general command of the Administrative Procedure Act as to judicial review, 5 U. S. C. §1009, excepts action which "is by law committed to agency discretion," it would seem in the last degree unlikely that Congress meant to require that a decision resting in executive grace, as to which the scope of any review is so narrow, must be initially reviewed by a court of three judges —a form of review of administrative action normally applied solely to "quasi-judicial" agency determinations made on a record available for the court's inspection, and only to some of those.

Still the Service maintains here, and four of our brothers agree, that a discretionary decision by the Attorney General to do nothing to interfere with a "final order of deportation," a decision to which he is free to come without using the procedures of §242(b), is itself a "final order of deportation" made pursuant to that section within the meaning of §106(a). The argument hinges on administrative regulations and on legislative history.

When the 1961 Act was adopted, 8 C. F. R. §244.1 provided that "Pursuant to Part 242 of this chapter and [fol. 16] section 244 of the Act, a special inquiry officer in his discretion may authorize the suspension of an alien's deportation, or authorize an alien to depart voluntarily from the United States * * *" Section 242.8(a) authorized special inquiry officers "to determine deportability and to make decisions including orders of deportation as provided by section 242(b) of the act," and also to exercise a variety of other powers. One of these was "to suspend deportation and authorize voluntary departure as provided by section 244 of the act." Determinations of special inquiry officers under Part 242 were final, §242.20, save for certain review by the Board of Immigration Appeals.[2] Thus, says the Service here, when Congress enacted §106 in 1961, it knew that the Attorney General had vested his dispensing powers under §244 in the same special inquiry officer who, under §242(b), was to "conduct proceedings * * * to determine the deportability of any alien," and therefore must have intended to include any "determination" made by the special inquiry officer against the alien among the orders made subject to review in the courts of appeals.

To us the "therefore" does not follow. When the 1961 amendment of the Immigration and Nationality Act spoke of "administrative proceedings under section 242(b) of this Act," it meant administrative proceedings which the Act required to be conducted under that section, not other proceedings for which the Attorney General happened to

[2] A different procedure was prescribed as to requests for withholding of deportation under §243(h), 8 U. S. C. §1253(h). These also were heard by a special inquiry officer, he forwarded a memorandum to the regional commissioner who made the final decision, 8 C. F. R. §243.3(b)(2).

be prescribing the same format that day by regulation, although he could prescribe an altogether different one the next, as, indeed, he was then doing under §243(h). Moreover, it is only "final orders of deportation" which [fol. 17] the Act makes reviewable in the courts of appeals —not any order resulting from use of the §242(b) form of procedure. Cf. *U. S. ex rel. Daniman* v. *Shaughnessy*, 210 F. 2d 564 (2 Cir. 1954).[3]

The Service argues that its construction would be convenient, would serve the Congressional purpose of dealing with "the growing frequency of judicial actions being instituted by undesirable aliens whose cases have no legal basis or merit, but which are brought solely for the purpose of preventing or delaying indefinitely their deportation from this country," H. R. Rep. No. 1086, 87th Cong., 1st Sess., in 2 U. S. Code Cong. & Ad. News (1961), 2967, and would comport with a Congressional intention "to

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[3] Our brother Clark's opinion stresses that §242(b) says the special inquiry officer "shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, *including* orders of deportation," apparently drawing the inference that Congress itself contemplated that the special inquiry officer would be delegated to make the discretionary determination confided to the Attorney General by later sections. The language does not support this—the purpose was to make clear that the authority of the special inquiry officer "included" the all important "final order of deportation," thereby dealing with the problem that had led to *Wong Yang Sung* v. *McGrath*, 339 U. S. 33 (1950), and its overruling by the Supplemental Appropriation Act of 1951, 64 Stat. 1048, which §403(a)(47) of the 1952 Act in turn repealed, 66 Stat. 280. The House Report, 82nd Cong. 2d Sess. No. 1365, makes it plain that the objective of §242(b) was to establish "special procedures • • • for the determination of whether or not an alien is subject to • • • deportation, which proceedings are to be conducted before special inquiry officers specially qualified to conduct such proceedings and designated by the Attorney General pursuant to the provisions of the bill," U. S. Code Cong. & Adm. News, 1710. Not a word in the discussion of the relief provisions of §244, pp. 1716-1721, refers to the special inquiry officers. Such powers as these officers now have, as to issues under §§243(h) or 244, derive, not from §242(b) but from delegation by the Attorney General pursuant to the general permission conferred by §103(a), which he can alter at his pleasure.

create a single, separate, statutory form of judicial review of administrative orders for the deportation and exclusion [fol. 18] of aliens * * *" *id.*, 2966. When the special inquiry officer, in a single order, has made a final order of deportation under §242(b), and has declined to suspend it or to authorize voluntary departure under §244 and determinations under both sections are challenged, bifurcation of the road to review may indeed be inconvenient, and if that were the only case that could arise and nothing else stood in the way, it might be tempting to take whatever liberties with the language of §106(a) were needed to avoid this. However, neither condition is made out.

This very case illustrates the common situation where, although determinations under both sections have been made by the special inquiry officer in a single disposition, deportability was conceded and the only challenge is to the determination under §244.[4] The likelihood of reversal in such a case, after the decision, in *Jay* v. *Boyd, supra,* that "there is nothing in the language of §244 of the Act upon which to base a belief that the Attorney General is required to give a hearing with all the evidence spread upon an open record with respect to the considerations which may bear upon his grant or denial of an application for suspension to an alien eligible for that relief," p. 353, that "suspension of deportation is not given to deportable aliens as a right, but, by congressional direction, it is dispensed according to the unfettered discretion of the Attorney General," pp. 357-358, and that the statute permits "decisions based upon matters outside the administrative record, at least when such action would be reasonable," p. 358, matters which a reviewing court cannot know but of whose existence it must take account, is minimal. Yet, on the Service's construction, an admittedly deportable alien like petitioner may, by filing a petition [fol. 19] for review, be entitled to the privilege, hitherto narrowly confined, of having his attack initially considered by three judges, and may obtain an automatic stay unless the court of appeals "otherwise directs," and this despite

[4] This is also the situation in *Ng Yen* v. *Immigration and Naturalization Service*, No. 27462, this day decided.

the provision in §106(a)(7) that "nothing in this section shall be construed to require the Attorney General to defer deportation of an alien after the issuance of a deportation order because of the right of judicial review of the order granted by this section * * *" Such a view scarcely comports with the Congressional purpose of expedition. Where the challenge is simply to the Attorney General's refusal to exercise a dispensing power, the Congressional purpose would be better served by leaving the Attorney General free to deport unless a district court halts him, action that should be rather rare in view of the narrow scope of review, than by stretching the language to encompass the review of such orders in the courts of appeals, with an automatic stay, particularly when we take into account that, unlike the district courts, the courts of appeals are not continuously in session and may be far removed from the scene of action.

Furthermore, extending our jurisdiction to such orders would not in fact "create a single, separate, statutory form of review." Section 106(a)(5) creates one exception; when a genuine issue of United States nationality is presented, the court of appeals must "transfer the proceedings to a United State district court for the district where the petitioner has his residence for hearing de novo of the nationality claim and determination as if such proceedings were originally initiated in the district court under the provisions of section 2201 of Title 28." Our brother Clark's opinion indicates another. After an automatic stay and ultimate adverse decision by us, the deportee, unless he voluntarily departs, can have another although more limited fling in the district court, by *habeas corpus*, once he [fol. 20] is taken into detention.[5] Again, a proceeding in the court of appeals under §106 affirming a determination of deportability and a denial of suspension will surely not prevent a subsequent action challenging the Attorney General's

[5] We are unable to follow an argument that judicial expansion of the phrase "final orders of deportation" in §106(a) is needed to trigger §106(c) limiting the scope of subsequent habeas corpus; that section would apply equally if petitioners like Foti and Ng Yen had sued in the district court.

selection, under §243(a), 8 U. S. C. §1253(a), of a country to which the alien is to be deported. Is this too a "final order of deportation" reviewable under §106? Are there then two "final orders," and when do the six months of §106(a)(1) start to run? It would seem more rather than less convenient that, where the challenge is not to deportability, proceedings both before and after detention should be in the district court, especially since the instances where the district court will enjoin either detention or deportation, or a court of appeals will grant a stay on an appeal from an adverse decision, will be exceedingly few.[6]

The construction urged by the Service encounters other difficulties, which suggest that even though the dictionary is not to be made a fortress, as our brothers remind us, reading Congressional language to mean what it says, particularly when Congress has used a technical term, although perhaps old-fashioned, may not be always and altogether ill-advised. On the view taken by the Service here, was [fol. 21] jurisdiction conferred on the courts of appeals only as to denials of suspension under §244(a) or also as to denials of withholding under §243(h)? As the regulations stood when Congress acted, it would be hard to sustain the latter under the Service's theory, since the determination was made, not by the special inquiry officer who alone is named in §242(b) but by the regional commissioner; yet the situations are so much alike that a construction including one and excluding the other would scarcely be rational. Since then the regulations have been amended, 26 F. R. 12113 (Dec. 19, 1961), so that the special inquiry officer—Board of Immigration Appeals procedure prevails also under §243(h). We do not question the power of the Attor-

[6] The argument for the broad construction of §106(a) seems to rest, in considerable part, on the inarticulate premise that all deportation suits are appealed, with stays generally granted. We know of no factual basis for this predicate. The 1961 Annual Report of the Director of the Administrative Office of the United States Courts shows, Table C 3, that during the fiscal year ending June 30, 1961 (the last complete year before the 1961 Act took effect), a total of 162 deportation cases were commenced in the district courts of the Second Circuit. During the same period our own docket of appeals in deportation cases did not exceed 15.

ney General thus to alter the procedure under §243(h); but it would be rather novel that an administrative regulation could bring something within the jurisdiction of the courts of appeals which was not covered by the language that Congress used and which, having given today, the Attorney General can take away tomorrow, as, indeed, he can do under §244. Also there will be cases when questions under §243(h) will arise only after the Attorney General has selected a particular country under §243(a), and that may be more than six months after the final order under §242(b). Then there is the case where the grievance is the refusal to reopen a deportation proceeding to permit an application for suspension to be filed, see *Wolf* v. *Boyd*, 238 F. 2d 249 (9 Cir.), cert. denied, 353 U. S. 936 (1957). Is such an order also a "final order of deportation"? Again, what of decisions denying voluntary departure? These also were made "pursuant to administrative proceedings conducted under section 242(b)," 8 C. F. R. §244.1. It seems hard to sustain that an order of a special inquiry officer denying suspension comes within §106(a) whereas one made in the same proceeding denying voluntary departure is not; yet it is quite incredible that Congress [fol. 22] meant to burden courts of appeals with review of orders of the latter sort, even though the grant of voluntary departure means that the order of deportation is not executed, with consequent benefit to the alien.

With expansion of the statute beyond the natural meaning of its words creating such problems, such a construction would require clear evidence from legislative history that this was the intent. But the inferences from the House Report against a construction going beyond the words are at least as strong as those for it. The letters of Deputy Attorney General Walsh and Deputy Attorney General White (as he then was) and the quoted testimony of the Assistant Attorney General heading the Criminal Division, *supra*, pp. 2968-2970, recommending the legislation, refer only to deportation orders in the technical sense and the Supreme Court decisions upholding their reviewability, *Brownell* v. *Rubinstein*, 346 U. S. 929 (1954), and *Shaughnessy* v. *Pedreiro*, 349 U. S. 48 (1955); no reference was made to the decisions, surely well known to the Department,

dealing with reviewability of orders declining to suspend deportation, *U. S. ex rel. Accardi* v. *Shaughnessy*, 347 U. S. 260 (1954); *Jay* v. *Boyd*, 351 U. S. 345 (1956). The Committee said it was not concerned over cases like Foti's or Ng Yen's; "The alien whose sole immigation offense is, perhaps, a defect in his visa, or an over-extended stay as a visitor, usually accepts the order of deportation and departs," p. 2967. The concern was over "subversives, gangsters, immoral, or narcotic peddlers" who use their "ill-gotten gains" in repetitive resistance to deportation orders. The sentence from the Report quoted by our brother Clark seems to point to a conclusion opposite to what is drawn from it; we should suppose the desire to give "the alien greater rights, greater security, and more assurance of a close study of his case by experienced judges," 2 U. S. Code Cong. & Ad. News (1961), p. 2972, [fol. 23] was more readily relatable to the determination of deportability, which is "as carefully guarded as any other piece of contentious litigation," *Milutin* v. *Bouchard, supra,* and there is thus something for judges to study, than to the discretionary decision of the Attorney General whether to withhold or suspend deportation or permit voluntary departure, as to which judges have so narrow a function to perform.

Neither do we find a sufficient basis for stretching the language in the discussion when a similar bill passed the House in 1959, 105 Cong. Reg. 12728. Representative Lindsay was concerned that the six months given an alien to seek judicial review should not begin to run "if there is any remedy on the administrative level left of any nature"; Representative Walter assured him this was so, "The final order means the final administrative order." Representative Lindsay returned to the charge when Representative Moore was speaking for the bill, and again sought and obtained assurance "that the words 'final deportation order' does not take effect until after determination of the question of suspension." Finally, Mr. Walter, in a further effort to satisfy Mr. Lindsay, added "that the 6 months' period on the question of finality of an order applies to the final administrative adjudication of the application for suspension of deportation just as it would apply to

any other issue brought up in deportation proceedings." We do not read this as indicating a view by Representative Walter that denial of an application for suspension was itself to be reviewable in a court of appeals. Representative Lindsay's concern was that the six months' period for challenging the deportation order should not start to run while departmental proceedings involving suspension were still going on. Representative Walter's assurance to him was well-founded, since proceedings before the Board of Immigration Appeals on an appeal from a denial of sus-
[fol. 24] pension toll the date of the final deportation order which initiates the six months' period of §106(a)(1), 8 C. F. R. §6.14, see also §106(c). Moreover, even if what was said were more probative than it is, a remark made in the course of debate, heard, in all probability, by only a few members of one house, two years before a bill's final passage, should not overcome clear statutory language. We have been appropriately warned against "safaris into legislative documents that succeed only in flushing a phrase here and a sentence there whose connection with the will of Congress is questionable at best," Bok, The Tampa Electric Case, 1961 Supreme Court Review, 267, 290.

Much more compelling than such dubious inferences from legislative history are considerations, not yet mentioned, arising from §106(a)(4). This says that, with an exception not here material, the judicial review confided to the courts of appeals by §106 "shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive." This is the standard long applied in the review of final orders of deportation under §242(b); Congress' direction that the courts of appeals should apply that standard is rather clear evidence that it was such orders, and only such, whose review by them was contemplated. This standard differs from that in reviewing the refusal to withhold or suspend deportation in two vital respects, already noted. In suspension and withholding proceedings, the Attorney General may find facts and consequently exercise discretion on the basis of confidential information not in "the administrative

record."[7] Judicial review must take into account the possibility that the Attorney General has relied on such extra-[fol. 25] record material, *Jay* v. *Boyd, supra,* at 358, as has been regularly done in the cases under §243(h), *U. S. ex rel. Dolenz* v. *Shaughnessy,* 206 F. 2d 392, 395 (2 Cir. 1953); *Diminich* v. *Esperdy,* 299 F. 2d 244 (2 Cir. 1961), cert. denied, 369 U. S. 844 (1962). Moreover, since a suspension or withholding of deportation "is a dispensing power, like a judge's power to suspend the execution of a sentence, or the President's to pardon a convict," Judge L. Hand in *U. S. ex rel. Kaloudis* v. *Shaughnessy,* 180 F. 2d 489, 491 (2 Cir. 1950), quoted with approval in *Jay* v. *Boyd, supra,* at 354 fn. 16, the rule has been that denial may not be set aside merely because unsupported "by reasonable, substantial, and probative evidence on the record considered as a whole," but only "when an alien has been denied appropriate procedural due process or a fair consideration of his application," *U. S. ex rel. Moon* v. *Shaughnessy,* 218 F. 2d 316, 318 (2 Cir. 1954), or where "it affirmatively appears that the denial has been actuated by considerations that Congress could not have intended to make relevant." *U. S. ex rel. Kaloudis* v. *Shaughnessy, supra; U. S. ex rel. Hintopoulos* v. *Shaughnessy,* 233 F. 2d 705, 708 (2 Cir. 1956), aff'd 353 U. S. 72 (1957). Yet, if orders withholding or denying suspension or denying voluntary departure have been made reviewable by §106(a), the standard of review must now be that provided in §106(a)(4), unless we are to apply further surgery to the statute,[8] as our brothers ap-

[7] A different rule may apply as to the preliminary determination of eligibility, see *Jay* v. *Boyd, supra,* at 352.

[8] Evidently disturbed by the consequences to which its position as to the scope of §106(a) leads, the Service argues in its brief in *Ng Yen* v. *Immigration and Naturalization Service,* No. 27462, that §106(a)(4) should not be read as prescribing the standard for review in all cases made originally reviewable in the court of appeals but only when that would have been the standard heretofore appropriate. In effect, it would rewrite §106(a)(4) to read "the petition shall be determined solely upon the administrative record upon which the deportation order is based *except insofar as the Attorney General was previously permitted to consider facts outside the administrative record, in which event the court shall take into consideration the possibility that his determination may*

[fol. 26] parently would. Since it is scarcely to be supposed that Congress meant to overturn the well-established principles governing the review of such orders and to elevate the alien's substantive rights in such cases to the same plane as exists for orders determining deportability, this is further and rather compelling evidence that the statute does not extend to them.

Thus we are unable to follow the decisions in the Seventh Circuit, cited by our brothers, *Blagaic* v. *Flagg*, 304 F. 2d 623 (1962) and *Roumeliotis* v. *I. N. S.*, 304 F. 2d 453 (1962), upholding jurisdiction of the court of appeals, in one case over the Attorney General's refusal to withhold deportation under §243(h) and in the other over his denial of a first preference immigrant visa under §203(a)(1)(A), 8 U. S. C. §1153(a)(1), despite objections there made by the Service. Indeed, the latter decision shows how very far from "final orders of deportation" the phrase "ancillary" will lead. And the triviality of the grounds urged on the merits in the two cases in the Seventh Circuit, as in the two here, adds point to our belief that Congress could not have meant to require three judges to pass upon such petitions. We find far more persuasive the thorough and well-reasoned opinion of Judge Edelstein in *Zupicich* v. *Esperdy*, S. D. N. Y., 61 Civ. 1271, filed July 11, 1962, which also called attention to two decisions in the Ninth Circuit, *Giova* v. *Rosenberg*, No. 17,655, June 15, 1962, and *Mai Kai Fong* v. *Immigration and Naturalization Service*, No. 17,723, June 28, 1962; but see *Louie King Fong* v. *Immigration and Naturalization Service*, No. 17,744, June 27, 1962.

[fol. 27] Although the Federal scheme for the review of administrative orders may not be a model of symmetry, see Gellhorn & Byse, Administrative Law, Cases and Comments (1960), pp. 218-223, it was generally true, until the

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be supported by such facts, and the Attorney General's findings of fact shall be conclusive if these are supported by reasonable, substantial, and probative evidence *or meet any lesser requirement existing before enactment of this act.*" We think this too radical surgery for a court to perform—especially when any need for the operation can be avoided by the simple therapy of reading "final orders of deportation" to mean "final orders of deportation," in which event §106(a)(4) fits perfectly.

Act of September 26, 1961, that only the orders of the independent regulatory commissions came initially before courts of three judges.[9] Orders relating to immigration matters, like those relating to naturalization, social security and railroad retirement benefits, veterans' insurance, and others, dealing with matters of great concern to an individual but not affecting the general public interest and unlikely to have important precedential effect, were left to review by a single district judge, more conveniently accessible to the parties, whose ruling might be appealed if the losing side were so advised. Because of a belief that any departure from this scheme was unwise, Representative Lindsay, in voting for the amendment, expressed the hope "that the Judicial Conference of the United States will conduct an early review of the operation of this procedure, if adopted, in order to make available to us its findings as to the administrative viability of the provision" with respect to the courts of appeals, 105 Cong. Rec. 12719 (1959). While the courts of appeals should give full effect to the change in pattern made by the Act of September 26, 1961, with respect to "final orders of deportation," they should not be astute to attribute to Congress a purpose to require them also to review in the first instance discretionary orders refusing to suspend or withhold deportation or to permit voluntary departure or to grant visas—a result that would represent a further deviation from the established [fol. 28] pattern, would go beyond the fair intendment of the words that Congress used, and, by imposing on the courts of appeals a quantity of petitions presenting no truly justiciable issue, would impair the "viability" of the new legislation.

The petition is dismissed for want of jurisdiction.

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[9] The sole apparent exception, the review of certain orders of the Secretary of Agriculture under the Packers and Stockyards Act, 1921, as amended, and the Perishable Agricultural Commodities Act, 1930, as amended, 5 U. S. C. §1032(b), is hardly a real one; under such acts the Secretary exercises functions altogether similar to those of a regulatory commission.

CLARK, *Circuit Judge*, with whom Judges WATERMAN, MOORE, and SMITH join (dissenting):

In our view our majority brethren have chosen to adopt an interpretation of statutory language which is both artificially literal and highly inappropriate to the actual situation; in so doing they have frustrated the legislative purpose and have saddled the litigants and the courts with a complicating, overlapping, and delaying additional form of deportation review. It is not without irony that a carefully formulated program fashioned over the years by Congress to provide a simple and complete form of review in this important area, comparable to that provided for the other administrative agencies, should result under judicial surgery in only adding delay and confusion to existing methods of review. As we expect to demonstrate, this is by no means a compelled result and we are at a loss to understand why it has been selected. None of the parties here or in the companion case of *Ng Yen* have sought or now seek this result, and we expect that they will be as surprised and disturbed by this unexpected outcome as are we.

Before we turn to this demonstration we should note the strong current of judicial opinion in accord with our and the parties' view. In this case Senior Judge Hincks and the writer—comprising with Judge Friendly the panel assigned to hear the petition for review—joined in an opinion for affirmance on the merits; Judge Friendly dissented and sought and obtained an order under 28 U. S. C. §46(c) [fol. 29] for further proceedings *in banc* before only the active judges. In *Ng Yen* the entire panel, consisting of Judges Waterman and Moore and the writer, joined in an opinion also for affirmance on the merits when we were met by the order for *in banc* proceedings. Thus the judges of our court who have considered the issue are equally divided, five to five; only the accident of a poorly worded statute (probably soon to be corrected) prevents Judge Hincks' vote from being officially recorded.[1] Elsewhere our view has

[1] See *United States* v. *American-Foreign S.S. Corp.*, 363 U. S. 685, 690 n. 7, referring to the amendment of 28 U. S. C. §46(c), recommended by the Judicial Conference of the United States. 1959 Ann. Rep. 9-10. See also 1961 Ann. Rep. 77.

the support of two well reasoned decisions by Seventh Circuit panels, *Blagaic* v. *Flagg*, 7 Cir., 304 F. 2d 623, and *Roumeliotis* v. *Immigration and Naturalization Service*, 7 Cir., 304 F. 2d 453, and of a Ninth Circuit decision, *Louie King Fong* v. *Immigration and Naturalization Service*, 9 Cir., —— F. 2d ——, June 27, 1962,[2] accepting without question a transfer from the district court, as required by [fol. 30] §5(b) of P. L. 87-301, 8 U. S. C. §1105a. (See *Dentico* v. *Immigration and Naturalization Service*, 2 Cir., 303 F. 2d 137.) There are also like decisions from the court below (to which these cases are presumably being remitted if new actions can be or are started), including a ruling in Foti's own action heretofore dismissed.[3]

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[2] Our brothers also cite two other decisions of Ninth Circuit panels, which, however, are of uncertain import because of lack of discussion of the issue before us. We understand that in at least one of them time has been extended for the filing of a petition for rehearing. In *Giova* v. *Rosenberg*, 9 Cir., —— F. 2d ——, June 15, 1962, the court declined jurisdiction to review a denial of a motion to reopen deportation proceedings before the Board of Immigration Appeals where the deportation order had been entered over four years earlier. Since a timely petition to review such a denial of a motion to reopen is surely within our jurisdiction—as, indeed, we held in *Dentico* v. *Immigration and Naturalization Service*, 2 Cir, 303 F. 2d 137—the difficulty would appear to concern the long delay. See 8 U. S. C. §1105a(a)(1). In *Mai Kai Fong* v. *Immigration and Naturalization Service*, 9 Cir., —— F. 2d ——, June 28, 1962, a similar situation of delay obtained and a like ruling was made, based, however, upon the two reasons that the matter had already been adjudicated in the District Court for the District of Columbia and that the petitioner had failed to exhaust his administrative remedies. Involved also were denials of applications for a stay which were held also settled by the earlier adjudication. Alternatively it was stated—in the only ruling here pertinent—that these denials were not reviewable as final orders of deportation; this ruling was made merely citing the doubtful *Giova* case without discussion.

[3] Of the eleven cases already transferred to our court pursuant to §5(b) of P. L. 87-301, 8 U. S. C. §1105a, it appears that six involved only deportability, while the other five raised either solely or additionally issues of suspension or other relief. In *Walters* v. *Esperdy*, D. C. S. D. N. Y., Civ. 138-347, now on our docket as No. 27695, a suspension case, Judge Bryan wrote a memorandum opinion Dec. 18, 1961, and filed his order of transfer Jan. 18, 1962. He said in his discussion that, while the question is not free from

Against this strong body of precedent our brothers are forced to seek support in a decision by Judge Edelstein in *Zupicich* v. *Esperdy*, D. C. S. D. N. Y., —— F. Supp. ——, July 11, 1962, made apparently before the contrary decisions in his own court referred to in our note 3, wherein the learned judge makes a ruling going somewhat along the way traveled by our brothers, though not so far. For he expressly refuses to pass upon a case arising under the new regulations of the Attorney General (discussed below and in the majority opinion) implementing and enforcing a unitary deportation procedure. But so far as the opinion goes, it shows a like hiatus in argument, as it starts with an initial stress upon the legislative intent to develop a simple complete system of review, as set forth in the Admin-[fol. 31] istrative Procedure Act, 5 U. S. C. §§1031-1042, and explicitly incorporated into our governing statute, 8 U. S. C. §1105a(a), and then proceeds to an interpretation of the statute which sets at naught the intent thus uncovered.

Why this is so and why our result is so confusing will become clear upon examination of the pertinent background. The Immigration and Nationality Act of 1952 contained provisions of an humanitarian nature authorizing the Attorney General to withhold deportation of an alien to a country where he would be subject to physical persecution, 8 U. S. C. §1253(h), and, in certain specified cases of hardship to himself and family, to suspend deportation of an alien and adjust his status to that of one lawfully admitted for permanent residence, 8 U. S. C. §1254(a)(1)(5). As was obvious and, indeed, intended, these provisions have become of the utmost importance in deportation cases; and in an increasingly large number of cases, applications for withholding or suspension of deportation have been

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doubt, yet the defendant had shown enough to justify transfer at this juncture and afford this court opportunity to pass on the question of its own jurisdiction. In the present case Foti's petition for review was filed, after dismissal upon consent, of his action below in the Southern District of New York after Judge Murphy had refused a preliminary injunction on the ground that the District Court no longer had jurisdiction of the action. Thus after a rather dizzy runabout, Foti now finds himself back where he started, but with a consent judgment against him.

made and review of their denial has been sought in the courts. Consideration of such denials has become a major part of our activity in the deportation field and from the nature of things is likely to increase rather than otherwise. For these remedies afford a way of obtaining a temporary stay and under appropriate conditions a permanent status as resident of an alien who has no other legal ground for relief; the two cases here before us where the petitions had necessarily to admit deportability are good examples of the importance which this discretionary relief has now assumed. True, the legislative intent is to make this an executive, rather than a judicial, function, so far as possible, as indeed is its attitude with respect to immigration matters generally. But even though judicial assistance is not easily obtained, it is natural, in view of the stakes, that it should be regularly and persistently sought. It is not conceivable that these well known facts were not known to the [fol. 32] sophisticated subcommittee on Immigration and Nationality of the House Judiciary Committee and its Chairman, Representative Walter, who have sponsored all the important legislation in this field. And it would be strange, indeed, if in their 1961 legislation as to review they conspicuously omitted any provision for this now vastly important aspect of deportation litigation.

Actually the history of the 1961 legislation shows pretty conclusively that there was no such omission. Improvement in the form of deportation review had been under consideration for some time. As early as 1954 the Attorney General had proposed legislation similar to that eventually passed, and bills in fact passed the House in 1958, 1959, and earlier in 1961. This history is traced in a perceptive Comment, *Deportation and Exclusion: A Continuing Dialogue between Congress and the Courts*, 71 Yale L. J. 760-792 (1962). In all the legislative activity there was expressed the purpose of reducing the existing complicated procedure to a simple system of direct review by the courts with decisive power, namely, the courts of appeals. Particularly stressed was the need to prevent the long delays possible under existing procedure "by repetitive appeals to the busy and overworked courts." H. R. Rep. No. 1086, 87th Cong., 1st Sess., Aug. 30, 1961, to accompany S. 2237, 2 U. S. Cong.

& Adm. News (1961) 2950, 2967, and see also H. R. Rep. No. 565, 87th Cong., 1st Sess. (1961); 71 Yale L. J. 760 n. 4 (1962). This is emphasized by the strong support given the proposed legislation from President Eisenhower (who called for its enactment in 1956 and 1957, 2 U. S. Cong. & Adm. News, *supra*, 2967, 1968) through the Department of Justice (Letters of Deputy Attorney General Walsh and of Deputy Attorney General White, March 30, 1959, and April 18, 1961, 2 U. S. Cong. & Adm. News, *supra*, 2968-2969) to the Judicial Conference of the United States, which endorsed the various bills on several occasions. 1959 Ann. [fol. 33] Rep. of the Proceedings of the Jud. Conf. of the U. S. 8; 1960 Ann. Rep. 30, 31; 1961 Ann. Rep. 18, 78, 79 (meetings of March and Sept. 1961).[4]

The legislative committees, recognizing that the right of habeas corpus must be preserved, as it is in 8 U. S. C. §1105a(a)(9), took steps reasonably designed to carry out their intent consistent with this preservation. Thus the statute provides that no deportation order shall be re-

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[4] Thus see 1959 Ann. Rep. 8:

"(3) *H. R. 2807, 86th Congress, to authorize a new type of judicial review of administrative orders for the deportation of aliens from the United States, which, except as to aliens in custody, would be exclusive.*—This proposal would permit an alien to file a petition for the review of a deportation order in a United States Court of Appeals within six months from the date of the final order. In so doing, the bill implements and applies Section 10 of the Administrative Procedure Act, and, with some exceptions, makes the procedure of the Hobbs Act (5 U. S. C. 1031 et seq.) applicable to the judicial review of deportation orders. The review would be had upon the administrative record upon which the order was based, and the Attorney General's findings of fact, if supported by reasonable, substantial and probative evidence on the record considered as a whole, would be conclusive. The right of any alien in custody to petition for a writ of habeas corpus would be preserved. The Committees [on Court Administration and Revision of the Laws] stated that the proposal is intended to do away with delays which heretofore had been encountered as a result of repeated litigation in deportation proceedings, some of which had been carried on for many years. On recommendation of the Committees, the Conference approved the bill."

The later reports cited referred back to and reiterated this approval.

viewed unless the alien has exhausted his administrative remedies, that every petition for review or for habeas corpus must state whether the order had been upheld in any prior judicial proceedings, and, if so, the circumstances, and that no such petition shall be entertained if the order's validity had been sustained in any prior judicial proceeding unless it presents grounds which the court finds could not have been presented in the earlier proceedings or that remedy was inadequate or ineffective [fol. 34] to test the validity of the order, 8 U. S. C. §1105a(c). All review must be upon the administrative record before the Attorney General unless an issue which is not frivolous is made as to nationality, when the case may be remitted to a district court for hearing *de novo* on this issue of fact, 8 U. S. C. §1105a(a)(4)(5). And a limitation is set upon petitions for review of six months from the date of the final deportation order or the effective date of the statute (Oct. 26, 1961). 8 U. S. C. §1105a(a)(1).

This carefully devised legislation is superimposed upon already existing law providing for extensive departmental hearings before hearing officers under procedure in accordance with regulations to be prescribed by the Attorney General. "The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien." 8 U. S. C. §1252(b)(4). As showing the absence of limitation on the inquiry officer's authority the first sentence of this subdivision is significant: "A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, * * * and, as authorized by the Attorney General, shall make determinations, *including* orders of deportation." (Italics supplied.) 8 U. S. C. §1252(b).[5] Pursuant to the authority given, the Attorney General has adopted regulations providing in detail for the initiation of proceedings before

[5] These provisions make doubly significant the venue of the new petition for review "in the judicial circuit in which the administrative proceedings before a special inquiry officer were conducted *in whole or in part*" (italics supplied), or in the circuit of the petitioner's residence, but not in more than one. 8 U. S. C. §1105a(a)(2). Obviously the legislative committees knew the parts into which the deportation proceedings may divide. And the implication of a single unitary review is obvious.

the special inquiry officer down through an appeal to the Board of Immigration Appeals and carefully safeguarding the procedural rights of the alien. 8 C. F. R. §242.1 *et seq.* [fol. 35] Secs. 242.8 and 242.17, adopted in 1957 and extended by amendment Dec. 19, 1961, give the inquiry officer full authority to hear and determine all these applications for discretionary relief we are now considering, and §242.17(d) as now amended provides: "An application under this section [i.e., for all the various types of discretionary relief here specified] shall be made *only during the hearing* and shall not be held to constitute a concession of alienage or deportability in any case in which the respondent does not admit his alienage or deportability." (Italics supplied.) And by §242.18 the decision of the special inquiry officer is required to include a discussion of the evidence and findings as to deportability and of the evidence pertinent to any application for discretionary relief under §242.17 and the reasons for granting or denying the relief. "The decision shall be concluded with the order of the special inquiry officer."

Thus the Attorney General has recognized and reenforced the unitary nature of the entire deportation proceeding in regulations which have the force and effect of law. *United States ex rel. Accardi* v. *Shaughnessy*, 347 U. S. 260, 265. Obviously it will be most difficult and inconvenient to disentangle and divide up the inquiry officer's one decision and order so that it may be subjected to different forms of piecemeal review. Our brothers have no suggestion as to how this difficulty will be met. There are other difficulties they do not discuss arising from the six months' time limitation and the requirement that all administrative remedies be satisfied. Suppose an alien against whom a deportation order has been entered wishes to seek its reopening for the consideration of some new evidence and also to ask for hardship relief. According to the provisions just discussed he must ask for both together and before filing his petition for review, though meanwhile the six months' period of limitation is appar- [fol. 36] ently running against him. His situation may well be precarious. See 71 Yale L. J. 760, 762-764 (1962) and the extract therefrom quoted in note 7 *infra*. Of course none of these difficulties arise under the view we are supporting.

The interpretation which our brothers find necessary rests at bottom upon four statutory words, viz., "final orders of deportation," and in last analysis is only an interpretation of "final."* This phrases occurs in 8 U. S. C. §1105a(a) referring back to 8 U. S. C. §1252(b), which we have already cited. There is nothing in this latter statute which expressly excludes the interpretation we make; indeed there is support for it, as we have stated. Moreover we believe the practicalities and natural analogies point that way. Involved here are decisions on applications to suspend or stay the operation of the deportation order. When a like application is made as to a "final judgment" in an ordinary civil action, the judgment is naturally stayed until the application is disposed of. F. R. 73(a); and see *Leishman* v. *Associated Wholesale Electric Co.*, 318 U. S. 203. As is well understood, here included are a wide variety of motions, such as those to make or amend findings, to alter and amend the judgment, and for a new trial. Consideration of these motions does not impugn the settled regard for finality of judgments in civil procedure; it is indeed difficult under the statutory language and even more under the practical compulsion of all the present circumstances to see why that analogy is not persuasive here. Perhaps the situation could not be more neatly put than in the following quotation from *Blagaic* v. *Flagg, supra*, 7 Cir., 304 F. 2d 623, 625: "If the withholding of deportation [fol. 37] is not granted, petitioner will be deported; thus, in a realistic sense the denial of a stay is a part of the deportation order."

Our brothers finally resort to the "old-fashioned," but hoary and illusory, principle of "reading Congressional language to mean what it says." "But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary," said our late great colleague Learned Hand in a famous passage, *Cabell*

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* If there is, indeed, compulsion in this word or phrase, it would seem to press in the opposite direction from that taken by our brothers, namely, to the really ultimate step, the issuance of the final warrant commanding deportation. But, presumably, because of the obvious unworkability of this meaning in the general statutory setting, no one appears to support this view.

v. *Markham*, 2 Cir., 148 F. 2d 737, 739, quoted in *Markham v. Cabell*, 326 U. S. 404, 409, affirming the decision below. This admonition seems particularly in point as to matters of procedural detail, which are only a means to an end where rigid formalism tends to defeat their own purpose, and not an end in themselves. Here the announced principle seems meaningless. It is doubtful if a layman without personal experience would know what "deportation" legally signifies; and if he had knowledge, he would hardly assume that the "proceedings" were at an end before the now so important steps to secure discretionary relief are begun. And as we have pointed out, to a lawyer a final judgment does not mean what it is here made to mean. Our brothers also refer to a variety of makeweight considerations which for the most part are not established and even if established would not weigh against the Congressional intent. We are given no figures as to the volume of litigation, present or prospective; in view of the delay now so easily to be secured by pressing steps under the divided procedure here forced upon us, it seems hardly doubtful but that our appellate work will be sharply increased, rather than otherwise. Whatever nuances of legal principle may distinguish the review of the order of deportation from that of denials of discretionary relief, certainly experienced circuit judges may work out the law as easily where entry to their court has been by way of [fol. 38] petition for agency review as where it has been by appeal from the district court. And the desire to give "the alien greater rights, greater security, and more assurance of a close study of his case by experienced judges," 2 U. S. Cong. & Adm. News (1961) 2972, would seem to apply as much to the orders now under consideration as to any others in view of the great importance that they now have in deportation proceedings. All this seems quite unpersuasive.

We have referred to the legislative history, which is convincing as to the view we are stating. But yet to be recounted is one item which is quite conclusive as to the legislative intent. That is the colloquy on the floor when the legislation passed the House in 1959. That colloquy is fairly recounted by our brothers in their opinion, although they

attempt to discredit its meaning and effect. But such discrediting does not seem possible. Recall the participants: Chairman Walter, the legislative leader in all this area; his assistant and committee reporter, Congressman Moore; and, asking the important questions, Representative Lindsay, who was thoroughly cognizant of the problem by having represented the government in *Jay* v. *Boyd*, 351 U. S. 345—the now controlling case as to review of this type of orders. Recall also the repeated assurances that "The final order means the final administrative order," and that the "'final deportation order' does not take effect until after determination of the question of suspension," with the ultimate statement of Chairman Walter himself "that the 6 months' period on the question of finality of an order applies to the final administrative adjudication of the application for suspension of deportation just as it would apply to any other issue brought up in deportation proceedings." 105 Cong. Rec. 12728. It was on this assurance that the bill was passed. [fol. 39] Here literally the words must mean what they say, as an informed commentator concludes, 71 Yale L. J. 760, 763, 764 n. 20 (1962),[7] and we are content to accept and act on this view.

Indeed our brothers' attempt to dull the impact of these enlightening responses is decidedly forced. Thus they imply

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[7] "Section 1(a)(1), H. R. 187, 75 Stat. 651 (1961), 8 U. S. C. A. §1105a(a)(1) (Supp. 1961). H. R. 187 allows six months from the date of the final deportation order in which to bring a petition for review. The determination of when an order becomes final has always been important because of the need to exhaust administrative remedies before seeking judicial review, a requirement retained in section (c) of the bill, 75 Stat. 653 (1961), 8 U. S. C. A. §1105a(c) (Supp. 1961). The determination of finality is made vital by the combination of the statute of limitations and the requirement of exhausting administrative finality. During the House debate on H. R. 2807, 86th Cong., 1st Sess. (1959), the author, Representative Walter, and the committee reporter, Representative Moore, agreed to a statement by Representative Lindsay that 'if there is any remedy on the administrative level left of any nature, that the deportation order will not be considered final.' 105 Cong. Rec. 12728 (1959). It was also stated that 'final' meant after a determination of suspension of deportation. *Ibid.* • • •" 71 Yale L. J. 760, 763, 764 n. 20 (1962).

that the legislators were avoiding the difficulty of the imposed statute of limitations by holding the six months' period for filing the review petition only suspended or erased by the filing of the application for discretionary relief. That is far from what the legislators said; and the results of such a statutory interpretation would surely be dubious and bizarre. Consider the example instanced above of a filing of a joint motion to reopen and application for discretionary relief. As we have seen, denial of the motion must go to the court of appeals, *Dentico* v. *Immigration and Naturalization Service, supra,* 2 Cir., 303 F. 2d 137, while denial of the application is now to be reserved for district court action. How long are the proceedings to be held in abeyance by these procedural steps? Suppose the motion and application are filed a day before the expiration of six [fol. 40] months after the entry of the deportation order and are not determined for, say, a year. Does the alien then still have time to file his review petition? If so, does he have six months or only a day in which to act? And when should he institute his district court action? On these matters, where in all fairness the alien should have clear expression of and timely warning as to his rights, the answers would be left hopelessly obscure. And the opportunities for delay and special treatment if the alien times his moves shrewdly are obvious.

Again our brothers guess—with no real knowledge—that only a few members of the House were present to hear the colloquy. We question the propriety of thus attempting to impugn the action of a co-ordinate arm of government; in any event the observation even if possibly well based has little pertinence to the issue. Had this debate not settled the question for the legislators, it would surely have been raised again in the final two years of strenuous debate on other portions of the legislation before the statute was enacted. Thus the very weakness of the answers suggested tends to prove the point as to the colloquy itself.

Hence it is difficult to perceive the reasons why our brothers have chosen the view they now adopt and press. It has been said that there is a continuing debate between Congress and the courts over immigration and nationality legislation, with the latter pressing the humanitarian approach as

against the sterner legislative view. 71 Yale L. J. 760 (1962). Be that as it may, it is hard to see how humanitarian reasons can be resorted to here to limit the meaning of the statutory enactments. In view of the unusually distinguished support, cited above, which the legislation brought out, we surely must hesitate to be certain that it is actually inimical to the interests of aliens. And we cannot shut our eyes to the vigorous, even bitter, debate, within [fol. 41] and without the halls of Congress in 1961 as to whether the review provisions of the act created undue hardship for the alien.[8] After such a thorough consideration by the legislators charged with the major responsibility in the premises, it is a question how far the courts may assume the role of knight-errant to correct assumed unfairnesses.

The question becomes the more pressing when we see the increased confusion and labor for the courts and litigants now impending and appreciate that the one clear result of the statutory reform under court amputation is now only to add extensive delay—of surely a year or more—to an already delaying procedure. Is it a boon to an alien, doomed eventually to be deported, to gain some more time while the doom continues to hang over him? And yet we perceive no other practical reason for the narrowing construction of a remedial statute here advanced. Hence we think the statutory purpose should be carried out. We believe we have jurisdiction to adjudicate Foti's petition on the merits and should proceed to do so.

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[8] This is recounted with full citations in 71 Yale L. J. 760 n. 3, 762 nn. 2-4 (1962). Included are references to a debate in the weekly *New Republic* involving Representative Walter, Assistant Attorney General Katzenbach, and the editors, coming finally to the question, "Did the New Republic Misrepresent Francis Walter's Bill?" Objection centered chiefly on the increased cost and inconvenience of applying to a court of appeals for review, and on the short statute of limitations, with the contention that the act will affect chiefly aliens with limited resources. It is said that many of those opposed were induced finally to vote for the Conference Report because of their desire to achieve passage of the alien orphan program and other humanitarian provisions which had been added to the original bill. *Ibid.* Of course the additional possibilities for delay afforded under the present decision will give increased opportunities for litigation to aliens of means.

[fol. 42]

IN THE UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Present: Hon. J. Edward Lumbard, Chief Judge, Hon. Charles E. Clark, Hon. Sterry R. Waterman, Hon. Leonard P. Moore, Hon. Henry J. Friendly, Hon. J. Joseph Smith, Hon. Irving R. Kaufman, Hon. Paul R. Hays, Hon. Thurgood Marshall, Circuit Judges.

FRANCESCO FOTI, a/k/a FRANK FOTI, Petitioner,

v.

P. A. ESPERDY, as District Director of the Immigration and Naturalization Service, New York District, Respondent.

JUDGMENT—September 21, 1962

A petition for review of an order of the Immigation and Naturalization Service.

This cause came on to be heard on the administrative record of the Immigration and Naturalization Service, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the petition be and it hereby is dismissed for lack of jurisdiction.

[File endorsement omitted]

[fol. 44] Clerk's certificate to foregoing transcript (omitted in printing).

[fol. 45]

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 7, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted limited to question 1 presented by the petition which reads as follows:

"(1) Whether or not the Circuit Court of Appeals has jurisdiction to review the final orders of the Special Inquiry Officer authorized by the Attorney General to be made during the course of deportation proceedings?"

The case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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OCT 20 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1962

No. [redacted] 28.

FRANCESCO FOTI a/k/a FRANK FOTI,

Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1962

No.

FRANCESCO FOTI, a/k/a FRANK FOTI,

Petitioner,

—vs.—

IMMIGRATION AND NATURALIZATION SERVICE

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner, prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Second Circuit entered in the above case on September 24, 1962.

Citation to Opinions Below

The District Court rendered no "opinion". The opinion of the Court of Appeals, printed in the Appendix hereto, Appendix A, *infra*, p. 7 *et seq.* is not yet reported.

Jurisdiction

The judgment of the Court of Appeals (Appendix B) for the Second Circuit was made and entered on September 24th, 1962 and copies thereof (Appendix B) are appended to

this petition in the Appendix at p. 44 *et seq.* The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

Questions Presented

The questions presented, which were incorrectly resolved by the Court of Appeals for the Second Circuit, are:

(1) Whether or not the Circuit Court of Appeals has jurisdiction to review the final orders of the Special Inquiry Officer authorized by the Attorney-General to be made during the course of deportation proceedings?

(2) Whether or not the petitioner has complied with the requirements of Section 244(a)(5) of the Immigration and Nationality Act, and, ergo, entitled to Suspension of Deportation?

Statutes, Federal Rules and Regulations Involved

The pertinent portions of H.R. 1086 to accompany S 2337, 87th Congress, 1st Session, August 30, 1961, pp. 22-3, Congress included Section 5 (a) in Public Law 87-301, S 2237, the Immigration and Nationality Act by adding to it a new Section 106 entitled "Judicial Review Of Orders Of Deportation and Exclusion", 8 U.S.C. (1962 Pocket Part) §1105a. 5 U.S.C. §§1031-1042 gives exclusive jurisdiction to the Court of Appeals in the case at bar. Immigration and Nationality Act (66 Stat. 163) (1952); Section 244(a)(5), 8 U.S.C. §1254(a)(5) and Section 242 (b).

Statement

This petition endeavors to review the final order of the Special Inquiry Officer, duly authorized by the Attorney-General to do so; wherein the petitioner sought to have his deportation suspended pursuant to Section 244(a)(5) of the Immigration and Nationality Act, 8 U.S.C. §1254 (a)(5).

The petitioner filed his petition to review the findings of the Attorney-General in the Court below. The petition alleged the Court of Appeals' jurisdiction, that he was in business in Brooklyn, that he led an exemplary life, good moral character, no criminal record anywhere in the world, ten years continuous residence in the United States, thereby entitling him to have his deportation suspended. Petitioner further asserted that he asked for the relief, but, that it was denied him. Resulting, in the conclusion that such denial was therefore, capricious, arbitrary and an abuse of discretion.

The facts taken from the record show that the petitioner, Francesco Foti, a native and citizen of Italy, last entered the United States in November, 1950 as a crewman on shore leave. He remained in the United States longer than the period authorized by that status, and at the deportation hearing conceded that he was illegally in the United States and deportable. In the course of that hearing, the petitioner made application for Suspension of Deportation pursuant to Section 244(a)(5) of the Immigration and Nationality Act, 8 U.S.C. §1254(a)(5).

The Special Inquiry Officer denied the Petitioner's application and it was appealed to the Board of Immigration

Appeals which said findings was upheld. Thereafter, an attempt was made to have the same reviewed by the District Court for the Southern District of New York. However, Judge Murphy of the said district, dismissed the application on the ground that the Court had no longer jurisdiction. Whereupon the petition was taken to the Court of Appeals for the Second Circuit.

Reasons for Granting Writ

The decision below should be reviewed because it erroneously interprets the Congressional enactment of August 30th, 1961, Section 5(a) of Public Law 87-301, effective September 26th, 1961. This Section amended the Immigration and Nationality Act by adding a new Section 106 entitled "JUDICIAL REVIEW OF ORDERS OF DEPORTATION AND EXCLUSION", 8 U.S.C. (1962 Pocket Part) §1105a.

It is urged that the Statute referred to confers upon the Court of Appeals the exclusive jurisdiction to hear and determine on petitions for review, the validity of the Attorney-General's order respecting an alien's deportation from the United States. This view has the support of the Seventh Circuit, *Blagaic* v. *Flagg*, 7 Cir., 304 F. (2d) 623, and *Roumdiotis* v. *Immigration and Naturalization Service*, 7 Cir., 304 F. (2d) 453 and in a number of instances 9th Circuit and District Courts within the Second Circuit, the said Courts have held that the jurisdiction to review appertains solely to the Court of Appeals under the new enactment.

It is the humble consideration of your petitioner that the Special Inquiry Officer and/or Attorney-General abused their discretion.

Heretofore, the general criteria or yardstick used by Attorney-General in determining whether exceptional and extremely unusual hardship is present is as follows:

1. Length of residence in United States
2. Family ties in United States
3. Possibility of obtaining a visa abroad
4. Financial burden on alien of having to go abroad to obtain a visa
5. Health and age of the alien

The existence of several, but not necessarily all, of these factors ordinarily will be required. *Matter of S*, 5 IN 409 (1953); *Matter of V*, 5 IN 523 (1953). The statute authorizing the Attorney-General to use his discretion to suspend deportation does not restrict the considerations which may be relied upon or the procedure by which discretion should be exercised, *Jay* v. *Boyd*, 76 S. Ct. 919, 351 U. S. 345, decided in 1956.

The question presented by this case are of great and recurring significance in the question of jurisdiction to review the administrative orders of the Attorney-General. The serious questions of public policy involved here and the effect of the decision below, if unreversed, upon the question of review by the Court of Appeals. It, therefore, becomes an appropriate question for the exercise of this Court's discretionary jurisdiction.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX A

Opinion—United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 295—September Term, 1961.

(Argued April 3, 1962 Decided September 21, 1962.)

Docket No. 27345

FRANCESCO FOTI, a/k/a FRANK FOTI,

Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Before:

LUMBARD, *Chief Judge,*
CLARK, WATERMAN, MOORE, FRIENDLY, SMITH,
KAUFMAN, HAYS and MARSHALL,
Circuit Judges.

Petition by Francesco Foti pursuant to §106(a), 8 U. S. C. §1105a(a), to review and set aside an order of the Immigration and Naturalization Service denying his appli-

cation for suspension of his deportation. Dismissed for want of jurisdiction.

JAMES J. CALLY, of Cally & Cally, New York City, *for petitioner.*

ROY BABITT, Sp. Asst. U. S. Atty., S. D. N. Y., New York City (Robert M. Morgenthau, U. S. Atty., New York City, on the brief), *for respondent.*

FRIENDLY, *Circuit Judge*:

Foti is a resident alien who entered this country on a seaman's visa and stayed illegally for ten years, leaving his wife and three children in Italy. When deportation proceedings were instituted, he conceded his deportability, but applied to the Attorney General for relief under §244 (a)(5) of the Immigration and Nationality Act, 8 U. S. C. §1254(a)(5), which provides that "the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who * * * is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien * * *" The Attorney General, through his Special Inquiry Officer, ruled that Foti did not qualify as a case of "exceptional and extremely unusual hardship," and therefore that no ground to exercise the granted discretion arose, but permitted voluntary departure. The decision was upheld by the Board of Immigration Appeals, and Foti now seeks to have us review it under §106 of the Act, 8 U. S. C. §1105a, enacted Sept. 26, 1961, 75 Stat. 651, providing for review of final orders of deportation by

courts of appeals by petition for review brought within six months.

Although the Immigration and Naturalization Service joins the petitioner in urging us to assume jurisdiction, in contrast to the position it has taken elsewhere, the matter is one that we must determine on our own account. The panel which heard the case upheld jurisdiction by a 2 – 1 vote, Judges Clark and Hincks forming the majority and the writer dissenting. Because of the important consequences of a decision that the recent Congressional grant to the courts of appeals of exclusive jurisdiction to review "final orders of deportation" was not in fact limited to such orders, as the language of the statute would indicate, but extended also to the variety of discretionary orders withholding or suspending deportation which the Attorney General is authorized to make, this case and the companion case of *Ng Yen* were deemed appropriate for *in banc* consideration. This has resulted in a determination, four judges dissenting, that we have no jurisdiction, the majority believing that although decision either way has its difficulties, there is no sufficient reason for expanding the words used by Congress beyond their well-understood meaning.

The text we must construe is §106, added to the Immigration and Nationality Act of 1952 in 1961, 75 Stat. 651, 8 U. S. C. §1105a. This directs, §106(a), that "The procedure prescribed by, and all the provisions of the Act of December 29, 1950, as amended (64 Stat. 1129; 68 Stat. 961; 5 U. S. C. 1031 et seq.)," providing for review in the courts of appeals of certain orders of the Federal Communications Commission, the Secretary of Agriculture, the Federal

Maritime Board (and its predecessors), and the Atomic Energy Commission, "shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this Act or comparable provisions of any prior Act. * * * "

Section 242 of the Immigration and Nationality Act of 1952, 8 U. S. C. §1252, sets up a comprehensive procedure to determine the deportability of an alien. Section 242(b), into which the new statute is expressly keyed, directs that "A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien," states in great detail how this shall be done, and lays down that "The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section." The specification of procedural safeguards is immediately followed by §242(c), providing that "When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States * * * "; during that period the alien may be detained. Section 242(d) adds that "Any alien, against whom a final order of deportation as defined in subsection (c) of this section, heretofore or hereafter issued has been outstanding for more than six months, shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General," and §242(e) imposes a

criminal penalty upon "Any alien against whom a final order of deportation is outstanding by reason of being a member of any of the classes" described in certain paragraphs of §241(a) who wilfully fails or refuses to depart "within a period of six months from the date of the final order of deportation under administrative processes, or, if judicial review is had, then from the date of the final order of the court * * *" When Congress, in 1961, gave the courts of appeals jurisdiction to review "final orders of deportation * * * made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this Act or comparable provisions of any prior Act," it was thus using a term of art which had been used repeatedly in §242 and possessed a well-understood meaning. We have already decided at least two such cases, *Dentico* v. *I. N. S.*, 303 F. 2d 137 (2 Cir. 1962), and *Schoeler* v. *I. N. S.*, —— F. 2d —— (2 Cir. 1962), where a "final order of deportation" was challenged, see also fn. 3 to Judge Clark's dissenting opinion.

Under the "prior Act[s]," 39 Stat. 889-890 (1917) and 43 Stat. 162 (1924), deportation, once determined, was generally mandatory. However, Congress has supplemented the deportation provisions contained in such acts and in §242 of the 1952 Act, by other provisions giving the Attorney General a wide gamut of discretionary withholding and dispensing powers. Section 243(h), 8 U. S. C. §1253(h), authorizes him "to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason." Section 244(a), 8 U. S. C. §1254(a),

provides that he "may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence" in five different categories of cases.[1] Sections 244(b) and (c), 8 U. S. C. §§1254 (b) and (c), direct that when the Attorney General has so suspended deportation, he is to report to Congress. In certain instances the Attorney General is to cancel deportation proceedings unless a house of Congress votes to the contrary; in others he is to deport unless Congress passes a concurrent resolution favoring suspension or if either house passes a resolution not favoring suspension. Finally §244(e), 8 U. S. C. §1254(e), authorizes the Attorney General "in his discretion" to "permit any alien under deportation proceedings," with certain exceptions, "to depart voluntarily from the United States * * * if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure * * * *" A further dispensing power, subject to Congressional concurrence, is conferred by §6 of the Refugee Relief Act of 1953, as amended, 50 U. S. C. App. §1971d.

The contrast between these sections giving the Attorney General discretion to withhold or suspend the deportation of an alien found to be deportable, and §242, relating to the determination of deportability, is marked. "The procedure outlined for a determination by the Attorney General or his delegate whether the alien, though subject to deporta-

[1] In the last four of these categories, it is a condition to relief that the alien "has not been served with a final order of deportation issued pursuant to this Act in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation."

tion shall have the order of deportation withheld, is a different matter," *Milutin* v. *Bouchard*, 299 F. 2d 50, 51 (3 Cir. 1962), cert. granted and judgment vacated on consent of Solicitor General, 370 U. S. 292 (1962). In fact, the withholding and suspending sections outline no procedure, let alone requiring use of the procedure prescribed by §242(h), to which the 1961 judicial review amendment is keyed. Whereas a determination of deportability must rest on findings of fact sufficient to bring the alien under a specific provision of law, suspension "is in all cases a matter of grace," resting in the "unfettered discretion of the Attorney General," *Jay* v. *Boyd*, 351 U. S. 345, 354, 357-358 (1956). Nowhere do the withholding or suspension sections use the phrase of the 1961 Act, "final order of deportation" to characterize orders made thereunder, although §244 does use it in explicit reference to deportation orders made under §242(b); these sections speak instead of withholding, suspending, or cancelling deportation when the Attorney General exercises his discretion in favor of the alien, and of ultimately deporting the alien when he does not. When the Attorney General refuses to withhold or suspend deportation under these sections, he no more "affirms" the order of deportation than a parole board "affirms" a conviction or sentence when it denies parole, *Jay* v. *Boyd*, *supra*; neither can the former action be fitly described as "ancillary" any more than the latter could be.

So far as the statute itself is concerned, it would thus seem rather plain that the Attorney General's refusal to intervene with respect to a "final order of deportation" made under §242(b) is not within the provision of the Act of 1961 for direct review of "final orders of deporta-

tion" by courts of appeals. To be sure, such orders may be nearer the end of the procedures an alien may invoke prior to deportation, but, were that the test, the warrant itself would be the "final order"—a position maintained by no one. When Congress, in 1961, defined its purpose by using a term having a meaning well understood in practice and repeatedly employed in the Immigration and Nationality Act itself, Congress must be taken to have adopted that meaning—at least in the absence of the clearest proof to the contrary. Yet, especially since the general command of the Administrative Procedure Act as to judicial review, 5 U. S. C. §1009, excepts action which "is by law committed to agency discretion," it would seem in the last degree unlikely that Congress meant to require that a decision resting in executive grace, as to which the scope of any review is so narrow, must be initially reviewed by a court of three judges—a form of review of administrative action normally applied solely to "quasi-judicial" agency determinations made on a record available for the court's inspection, and only to some of those.

Still the Service maintains here, and four of our brothers agree, that a discretionary decision by the Attorney General to do nothing to interfere with a "final order of deportation," a decision to which he is free to come without using the procedures of §242(b), is itself a "final order of deportation" made pursuant to that section within the meaning of §106(a). The argument hinges on administrative regulations and on legislative history.

When the 1961 Act was adopted, 8 C. F. R. §244.1 provided that "Pursuant to Part 242 of this chapter and section 244 of the Act, a special inquiry officer in his dis-

cretion may authorize the suspension of an alien's deportation, or authorize an alien to depart voluntarily from the United States * * * " Section 242.8(a) authorized special inquiry officers "to determine deportability and to make decisions including orders of deportation as provided by section 242(b) of the act," and also to exercise a variety of other powers. One of these was "to suspend deportation and authorize voluntary departure as provided by section 244 of the act." Determinations of special inquiry officers under Part 242 were final, §242.20, save for certain review by the Board of Immigration Appeals.[2] Thus, says the Service here, when Congress enacted §106 in 1961, it knew that the Attorney General had vested his dispensing powers under §244 in the same special inquiry officer who, under §242(b), was to "conduct proceedings * * * to determine the deportability of any alien," and therefore must have intended to include any "determination" made by the special inquiry officer against the alien among the orders made subject to review in the courts of appeals.

To us the "therefore" does not follow. When the 1961 amendment of the Immigration and Nationality Act spoke of "administrative proceedings under section 242(b) of this Act," it meant administrative proceedings which the Act required to be conducted under that section, not other proceedings for which the Attorney General happened to be prescribing the same format that day by regulation, although he could prescribe an altogether different one

[2] A different procedure was prescribed as to requests for withholding of deportation under §243(h), 8 U. S. C. §1253(h). These also were heard by a special inquiry officer; he forwarded a memorandum to the regional commissioner who made the final decision, 8 C. F. R. §243.3 (b)(2).

the next, as, indeed, he was then doing under §243(h). Moreover, it is only "final orders of deportation" which the Act makes reviewable in the courts of appeals—not any order resulting from use of the §242(b) form of procedure. Cf. *U. S. ex. rel. Dahiman* v. *Shaughnessy*, 210 F. 2d 564 (2 Cir. 1954).[3]

The Service argues that its construction would be convenient, would serve the Congressional purpose of dealing with "the growing frequency of judicial actions being instituted by undesirable aliens whose cases have no legal basis of merit, but which are brought solely for the purpose of preventing or delaying indefinitely their depor-

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[3] Our brother Clark's opinion stresses that §242(b) says the special inquiry officer "shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, *including* orders of deportation," apparently drawing the inference that Congress itself contemplated that the special inquiry officer would be delegated to make the discretionary determination confided to the Attorney General by later sections. The language does not support this—the purpose was to make clear that the authority of the special inquiry officer "included" the all important "final order of deportation," thereby dealing with the problem that had led to *Wong Yang Sung* v. *McGrath*, 339 U. S. 33 (1950), and its overruling by the Supplemental Appropriation Act of 1951, 64 Stat. 1048, which §403(a)(47) of the 1952 Act in turn repealed, 66 Stat. 280. The House Report, 82nd Cong. 2d Sess. No. 1365, makes it plain that the objective of §242(b) was to establish "special procedures * * * for the determination of whether or not an alien is subject to * * * deportation, which proceedings are to be conducted before special inquiry officers specially qualified to conduct such proceedings and designated by the Attorney General pursuant to the provisions of the bill," U. S. Code Cong. & Adm. News, 1710. Not a word in the discussion of the relief provisions of §244, pp. 1716-1721, refers to the special inquiry officers. Such powers as these officers now have, as to issues under §§243(h) or 244, derive, not from §242(b), but from delegation by the Attorney General pursuant to the general permission conferred by §103(a), which he can alter at his pleasure.

tation from this country," H. R. Rep. No. 1086, 87th Cong., 1st Sess., in 2 U. S. Code Cong. & Ad. News (1961) 2967, and would comport with a Congressional intention "to create a single, separate, statutory form of judicial review of administrative orders for the deportation and exclusion of aliens . . . ." *id.*, 2966. When the special inquiry officer, in a single order, has made a final order of deportation under §242(b), and has declined to suspend it or to authorize voluntary departure under §244 and determinations under both sections are challenged, bifurcation of the road to review may indeed be inconvenient, and if that were the only case that could arise and nothing else stood in the way, it might be tempting to take whatever liberties with the language of §106(a) were needed to avoid this. However, neither condition is made out.

This very case illustrates the common situation where, although determinations under both sections have been made by the special inquiry officer in a single disposition, deportability was conceded and the only challenge is to the determination under §244.[4] The likelihood of reversal in such a case, after the decision in *Jay* v. *Boyd, supra,* that "there is nothing in the language of §244 of the Act upon which to base a belief that the Attorney General is required to give a hearing with all the evidence spread upon an open record with respect to the considerations which may bear upon his grant or denial of an application for suspension to an alien eligible for that relief," p. 353, that "suspension of deportation is not given to deportable aliens as a right, but, by congressional direction,

[4] This is also the situation in *Ng Yen* v. *Immigration and Naturalization Service*, No. 27462, this day decided.

it is dispensed according to the unfettered discretion of the Attorney General," pp. 357-358, and that the statute permits "decisions based upon matters outside the administrative record, at least when such action would be reasonable," p. 358, matters which a reviewing court cannot know but of whose existence it must take account, is minimal. Yet, on the Service's construction, an admittedly deportable alien like petitioner may, by filing a petition for review, be entitled to the privilege, hitherto narrowly confined, of having his attack initially considered by three judges, and may obtain an automatic stay unless the court of appeals "otherwise directs," and this despite the provision in §106(a)(7) that "nothing in this section shall be construed to require the Attorney General to defer deportation of an alien after the issuance of a deportation order because of the right of judicial review of the order granted by this section * * *" Such a view scarcely comports with the Congressional purpose of expedition. Where the challenge is simply to the Attorney General's refusal to exercise a dispensing power, the Congressional purpose would be better served by leaving the Attorney General free to deport unless a district court halts him, action that should be rather rare in view of the narrow scope of review, than by stretching the language to encompass the review of such orders in the courts of appeals, with an automatic stay, particularly when we take into account that, unlike the district courts, the courts of appeals are not continuously in session and may be far removed from the scene of action.

Furthermore, extending our jurisdiction to such orders would not in fact "create a single, separate, statutory form

of review." Section 106(a)(5) creates one exception; when a genuine issue of United States nationality is presented, the court of appeals must "transfer the proceedings to a United States district court for the district where the petitioner has his residence for hearing de novo of the nationality claim and determination as if such proceedings were originally initiated in the district court under the provisions of section 2201 of Title 28." Our brother Clark's opinion indicates another. After an automatic stay and ultimate adverse decision by us, the deportee, unless he voluntarily departs, can have another although more limited fling in the district court, by *habeas corpus*, once he is taken into detention.[5] Again, a proceeding in the court of appeals under §106 affirming a determination of deportability and a denial of suspension will surely not prevent a subsequent action challenging the Attorney General's selection, under §243(a), 8 U. S. C. §1253(a), of a country to which the alien is to be deported. Is this too a "final order of deportation" reviewable under §106? Are there then two "final orders," and when do the six months of §106(a)(1) start to run? It would seem more rather than less convenient that, where the challenge is not to deportability, proceedings both before and after detention should be in the district court, especially since the instances where the district court will enjoin either detention or deportation, or a court of appeals will grant a stay

[5] We are unable to follow an argument that judicial expansion of the phrase "final orders of deportation" in §106(a) is needed to trigger §106(c) limiting the scope of subsequent habeas corpus; that section would apply equally if petitioners like Foti and Ng Yen had sued in the district court.

on an appeal from an adverse decision, will be exceedingly few.[6]

The construction urged by the Service encounters other difficulties, which suggest that even though the dictionary is not to be made a fortress, as our brothers remind us, reading Congressional language to mean what it says, particularly when Congress has used a technical term, although perhaps old-fashioned, may not be always and altogether ill-advised. On the view taken by the Service here, was jurisdiction conferred on the courts of appeals only as to denials of suspension under §244(a) or also as to denials of withholding under §243(h)? As the regulations stood when Congress acted, it would be hard to sustain the latter under the Service's theory, since the determination was made, not by the special inquiry officer who alone is named in §242(b) but by the regional commissioner; yet the situations are so much alike that a construction including one and excluding the other would scarcely be rational. Since then the regulations have been amended, 26 F. R. 12113 (Dec. 19, 1961), so that the special inquiry officer—Board of Immigration Appeals procedure prevails also under §243(h). We do not question the power of the Attorney General thus to alter the procedure under §243(h), but it would be rather novel that an administrative regulation

[6] The argument for the broad construction of §106(a) seems to rest, in considerable part, on the inarticulate premise that all deportation suits are appealed, with stays generally granted. We know of no factual basis for this predicate. The 1961 Annual Report of the Director of the Administrative Office of the United States Courts shows, Table C 3, that during the fiscal year ending June 30, 1961 (the last complete year before the 1961 Act took effect), a total of 162 deportation cases were commenced in the district courts of the Second Circuit. During the same period our own docket of appeals in deportation cases did not exceed 15.

could bring something within the jurisdiction of the courts of appeals which was not covered by the language that Congress used and which, having given today, the Attorney General can take away tomorrow, as, indeed, he can do under §244. Also there will be cases when questions under §243(h) will arise only after the Attorney General has selected a particular country under §243(a), and that may be more than six months after the final order under §242(b). Then there is the case where the grievance is the refusal to reopen a deportation proceeding to permit an application for suspension to be filed, see *Wolf* v. *Boyd*, 238 F. 2d 249 (9 Cir.), cert, denied, 353 U. S. 936 (1957). Is such an order also a "final order of deportation"? Again, what of decisions denying voluntary departure? These also were made "pursuant to administrative proceedings conducted under section 242(b)," 8 C. F. R. §244.1. It seems hard to sustain that an order of a special inquiry officer denying suspension comes within §106(a) whereas one made in the same proceeding denying voluntary departure is not; yet it is quite incredible that Congress meant to burden courts of appeals with review of orders of the latter sort, even though the grant of voluntary departure means that the order of deportation is not executed, with consequent benefit to the alien.

With expansion of the statute beyond the natural meaning of its words creating such problems, such a construction would require clear evidence from legislative history that this was the intent. But the inferences from the House Report against a construction going beyond the words are at least as strong as those for it. The letters of Deputy Attorney General Walsh and Deputy Attorney General

White (as he then was) and the quoted testimony of the Assistant Attorney General heading the Criminal Division, *supra*, pp. 2968-2970, recommending the legislation, refer only to deportation orders in the technical sense and the Supreme Court decisions upholding their reviewability, *Brownell* v. *Rubinstein*, 346 U. S. 929 (1954), and *Shaughnessy* v. *Pedreiro*, 349 U. S. 48 (1955); no reference was made to the decisions, surely well known to the Department, dealing with reviewability of orders declining to suspend deportation, *U. S. ex rel. Accardi* v. *Shaughnessy*, 347 U. S. 260 (1954); *Jay* v. *Boyd*, 351 U. S. 345 (1956). The Committee said it was not concerned over cases like Foti's or Ng Yen's; "The alien whose sole immigration offense is, perhaps a defect in his visa, or an over-extended stay as a visitor, usually accepts the order of deportation and departs," p. 2967. The concern was over "subversives, gangsters, immoral, or narcotic peddlers" who use their "ill-gotten gains" in repetitive resistance to deportation orders. The sentence from the Report quoted by our brother Clark seems to point to a conclusion opposite to what is drawn from it; we should suppose the desire to give "the alien greater rights, greater security, and more assurance of a close study of his case by experienced judges," 2 U. S. Code Cong. & Ad. News (1961), p. 2972, was more readily relatable to the determination of deportability, which is "as carefully guarded as any other piece of contentious litigation," *Milutin* v. *Bouchard*, *supra*, and there is thus something for judges to study, than to the discretionary decision of the Attorney General whether to withhold or suspend deportation or permit voluntary departure, as to which judges have so narrow a function to perform.

Neither do we find a sufficient basis for stretching the language in the discussion when a similar bill passed the House in 1959, 105 Cong. Rec. 12728. Representative Lindsay was concerned that the six months given an alien to seek judicial review should not begin to run "if there is any remedy on the administrative level left of any nature"; Representative Walter assured him this was so, "The final order means the final administrative order." Representative Lindsay returned to the charge when Representative Moore was speaking for the bill, and again sought and obtained assurance "that the words 'final deportation order' does not take effect until after determination of the question of suspension." Finally, Mr. Walter, in a further effort to satisfy Mr. Lindsay, added "that the 6 months' period on the question of finality of an order applies to the final administrative adjudication of the application for suspension of deportation just as it would apply to any other issue brought up in deportation proceedings." We do not read this as indicating a view by Representative Walter that denial of an application for suspension was itself to be reviewable in a court of appeals. Representative Lindsay's concern was that the six months' period for challenging the deportation order should not start to run while departmental proceedings involving suspension were still going on. Representative Walter's assurance to him was well-founded, since proceedings before the Board of Immigration Appeals on an appeal from a denial of suspension toll the date of the final deportation order which initiates the six months' period of §106(a),1), 8 C. F. R. §6.14, see also §106(c). Moreover, even if what was said were more probative than it is, a remark made in the course

of debate, heard, in all probability, by only a few members of one house, two years before a bill's final passage, should not overcome clear statutory language. We have been appropriately warned against "safaris into legislative documents that succeed only in flushing a phrase here and a sentence there whose connection with the will of Congress is questionable at best," Bok, The Tampa Electric Case, 1961 Supreme Court Review, 267, 290.

Much more compelling than such dubious inferences from legislative history are considerations, not yet mentioned, arising from §106(a)(4). This says that, with an exception not here material, the judicial review confided to the courts of appeals by §106 "shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive." This is the standard long applied in the review of final orders of deportation under §242(b); Congress' direction that the courts of appeals should apply that standard is rather clear evidence that it was such orders, and only such, whose review by them was contemplated. This standard differs from that in reviewing the refusal to withhold or suspend deportation in two vital respects, already noted. In suspension and withholding proceedings, the Attorney General may find facts and consequently exercise discretion on the basis of confidential information not in "the administrative record."[7] Judicial review must take into account the possibility that the Attorney General

[7] A different rule may apply as to the preliminary determination of eligibility, see *Jay* v. *Boyd*, *supra*, at 352.

has relied on such extra-record material, *Jay* v. *Boyd, supra,* at 358, as has been regularly done in the cases under §243(h), *U. S. ex rel. Dolenz* v. *Shaughnessy,* 206 F. 2d 392, 395 (2 Cir. 1953); *Diminich* v. *Esperdy,* 299 F. 2d 244 (2 Cir. 1961), cert. denied, 369 U. S. 844 (1962). Moreover, since a suspension or withholding of deportation "is a dispensing power, like a judge's power to suspend the execution of a sentence, or the President's to pardon a convict," Judge L. Hand in *U. S. ex rel. Kaloudis* v. *Shaughnessy,* 180 F. 2d 489, 491 (2 Cir. 1950), quoted with approval in *Jay* v. *Boyd, supra,* at 354 fn. 16, the rule has been that denial may not be set aside merely because unsupported "by reasonable, substantial, and probative evidence on the record considered as a whole," but only "when an alien has been denied appropriate procedural due process or a fair consideration of his application," *U. S. ex rel. Moon* v. *Shaughnessy,* 218 F. 2d 316, 318 (2 Cir. 1954), or where "it affirmatively appears that the denial has been actuated by considerations that Congress could not have intended to make relevant." *U. S. ex rel. Kaloudis* v. *Shaughnessy, supra; U. S. ex rel. Hintopoulos* v. *Shaughnessy,* 233 F. 2d 705, 708 (2 Cir. 1956), aff'd 353 U. S. 72 (1957). Yet, if orders withholding or denying suspension or denying voluntary departure have been made reviewable by §106(a), the standard of review must now be that provided in §106(a)(4), unless we are to apply further surgery to the statute,[8] as our brothers apparently would.

[8] Evidently disturbed by the consequences to which its position as to the scope of §106(a) leads, the Service argues in its brief in *Ng Yen* v. *Immigration and Naturalization Service,* No. 27462, that §106(a)(4) should not be read as prescribing the standard for review in all cases made originally reviewable in the court of appeals but only when

Since it is scarcely to be supposed that Congress meant to overturn the well-established principles governing the review of such orders and to elevate the alien's substantive rights in such cases to the same plane as exists for orders determining deportability, this is further and rather compelling evidence that the statute does not extend to them.

Thus we are unable to follow the decisions in the Seventh Circuit, cited by our brothers, *Blagaic* v. *Flagg*, 304 F. 2d 623 (1962) and *Roumeliotis* v. *I. N. S.*, 304 F. 2d 453 (1962), upholding jurisdiction of the court of appeals, in one case over the Attorney General's refusal to withhold deportation under §243(h) and in the other over his denial of a first preference immigrant visa under §203(a)(1)(A), 8 U. S. C. §1153(a)(1), despite objections there made by the Service. Indeed, the latter decision shows how very far from "final orders of deportation" the phrase "ancillary" will lead. And the triviality of the grounds urged on the merits in the two cases in the Seventh Circuit, as in the two here, adds point to our belief that Congress could not have meant to require three judges to pass upon such petitions. We find far more persuasive the thorough and well-reasoned opin-

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that would have been the standard heretofore appropriate. In effect, it would rewrite §106(a)(4) to read "the petition shall be determined solely upon the administrative record upon which the deportation order is based *except insofar as the Attorney General was previously permitted to consider facts outside the administrative record, in which event the court shall take into consideration the possibility that his determination may be supported by such facts,* and the Attorney General's findings of fact shall be conclusive if these are supported by reasonable, substantial, and probative evidence *or meet any lesser requirement existing before enactment of this act.*" We think this too radical surgery for a court to perform—especially when any need for the operation can be avoided by the simple therapy of reading "final orders of deportation" to mean "final orders of deportation," in which event §106(a)(4) fits perfectly.

ion of Judge Edelstein in *Zupicich* v. *Esperdy*, S. D. N. Y., 61 Civ. 1271, filed July 11, 1962, which also called attention to two decisions in the Ninth Circuit, *Giova* v. *Rosenberg*, No. 17,655, June 15, 1962, and *Mai Kai Fong* v. *Immigration and Naturalization Service*, No. 17,723, June 28, 1962; but see *Louie King Fong* v. *Immigration and Naturalization Service*, No. 17,744, June 27, 1962.

Although the Federal scheme for the review of administrative orders may not be a model of symmetry, see Gellhorn & Byse, Administrative Law, Cases and Comments (1960), pp. 218-223, it was generally true, until the Act of Setember 26, 1961, that only the orders of the independent regulatory commissions came initially before courts of three judges.[9] Orders relating to immigration matters, like those relating to naturalization, social security and railroad retirement benefits, veterans' insurance, and others, dealing with matters of great concern to an individual but not affecting the general public interest and unlikely to have important precedential effect, were left to review by a single district judge, more conveniently accessible to the parties, whose ruling might be appealed if the losing side were so advised. Because of a belief that any departure from this scheme was unwise, Representative Lindsay, in voting for the amendment, expressed the hope "that the Judicial Conference of the United States will conduct an early review of the operation of this procedure,

[9] The sole apparent exception, the review of certain orders of the Secretary of Agriculture under the Packers and Stockyards Act, 1921, as amended, and the Perishable Agricultural Commodities Act, 1930, as amended, 5 U. S. C. §1032(b), is hardly a real one; under such acts the Secretary exercises functions altogether similar to those of a regulatory commission.

if adopted, in order to make available to us its findings as to the administrative viability of the provision" with respect to the courts of appeals, 105 Cong. Rec. 12719 (1959). While the courts of appeals should give full effect to the change in pattern made by the Act of September 26, 1961, with respect to "final orders of deportation," they should not be astute to attribute to Congress a purpose to require them also to review in the first instance discretionary orders refusing to suspend or withhold deportation or to permit voluntary departure or to grant visas—a result that would represent a further deviation from the established pattern, would go beyond the fair intendment of the words that Congress used, and, by imposing on the courts of appeals a quantity of petitions presenting no truly justiciable issue, would impair the "viability" of the new legislation.

The petition is dismissed for want of jurisdiction.

CLARK, *Circuit Judge*, with whom Judges WATERMAN, MOORE, and SMITH join (dissenting):

In our view our majority brethren have chosen to adopt an interpretation of statutory language which is both artificially literal and highly inappropriate to the actual situation; in so doing they have frustrated the legislative purpose and have saddled the litigants and the courts with a complicating, overlapping, and delaying additional form of deportation review. It is not without irony that a carefully formulated program fashioned over the years by Congress to provide a simple and complete form of review in

this important area, comparable to that provided for the other administrative agencies, should result under judicial surgery in only adding delay and confusion to existing methods of review. As we expect to demonstrate, this is by no means a compelled result and we are at a loss to understand why it has been selected. None of the parties here or in the companion case of *Ng Yen* have sought or now seek this result, and we expect that they will be as surprised and disturbed by this unexpected outcome as are we.

Before we turn to this demonstration we should note the strong current of judicial opinion in accord with our and the parties' view. In this case Senior Judge Hincks and the writer—comprising with Judge Friendly the panel assigned to hear the petition for review—joined in an opinion for affirmance on the merits; Judge Friendly dissented and sought and obtained an order under 28 U. S. C. §46(c) for further proceedings *in banc* before only the active judges. In *Ng Yen* the entire panel, consisting of Judges Waterman and Moore and the writer, joined in an opinion also for affirmance on the merits when we were met by the order for *in banc* proceedings. Thus the judges of our court who have considered the issue are equally divided, five to five; only the accident of a poorly worded statute (probably soon to be corrected) prevents Judge Hincks' vote from being officially recorded.[1] Elsewhere our view has the support of two well reasoned decisions by Seventh Circuit panels, *Blagaic* v. *Flagg*, 7 Cir., 304 F. 2d 623, and *Roumeliotis* v. *Immigration and Naturalization Service*, 7

[1] See *United States* v. *American-Foreign S.S. Corp.*, 363 U. S. 685, 690 n. 7, referring to the amendment of 28 U. S. C. §46(c), recommended by the Judicial Conference of the United States. 1959 Ann. Rep. 9-10. See also 1961 Ann. Rep. 77.

Cir., 304 F. 2d 453, and of a Ninth Circuit decision, *Louie King Fong* v. *Immigration and Naturalization Service*, 9 Cir., —— F. 2d ——, June 27, 1962,[2] accepting without question a transfer from the district court, as required by §5(b) of P. L. 87-301, 8 U. S. C. §1105a. (See *Dentico* v. *Immigration and Naturalization Service*, 2 Cir., 303 F. 2d 137.) There are also like decisions from the court below (to which these cases are presumably being remitted if new actions can be or are started), including a ruling in Foti's own action heretofore dismissed.[3]

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[2] Our brothers also cite two other decisions of Ninth Circuit panels, which, however, are of uncertain import because of lack of discussion of the issue before us. We understand that in at least one of them time has been extended for the filing of a petition for rehearing. In *Giova* v. *Rosenberg*, 9 Cir., —— F. 2d ——, June 25, 1962, the court declined jurisdiction to review a denial of a motion to reopen deportation proceedings before the Board of Immigration Appeals where the deportation order had been entered over four years earlier. Since a timely petition to review such a denial of a motion to reopen is surely within our jurisdiction—as, indeed, we held in *Dentico* v. *Immigration and Naturalization Service*, 2 Cir., 303 F. 2d 137—the difficulty would appear to concern the long delay. See 8 U. S. C. §1105a(a)(1). In *Mai Kai Fong* v. *Immigration and Naturalization Service*, 9 Cir., —— F. 2d ——, June 28, 1962, a similar situation of delay obtained and a like ruling was made, based, however, upon the two reasons that the matter had already been adjudicated in the District Court for the District of Columbia and that the petitioner had failed to exhaust his administrative remedies. Involved also were denials of applications for a stay which were held also settled by the earlier adjudication. Alternatively it was stated—in the only ruling here pertinent—that these denials were not reviewable as final orders of deportation; this ruling was made merely citing the doubtful *Giova* case without discussion.

[3] Of the eleven cases already transferred to our court pursuant to §5(b) of P. L. 87-301, 8 U. S. C. §1105a, it appears that six involved only deportability, while the other five raised either solely or additionally issues of suspension or other relief. In *Walters* v. *Esperdy*, D. C. S. D. N. Y., Civ. 138-347, now on our docket as No. 27695, a suspension case, Judge Bryan wrote a memorandum opinion Dec. 18, 1961, and filed his order of transfer Jan. 18, 1962. He said in his discussion that, while the question is not free from doubt, yet the defen-

Against this strong body of precedent our brothers are forced to seek support in a decision by Judge Edelstein in *Zupicich* v. *Esperdy*, D. C. S. D. N. Y., —— F. Supp. ——, July 11, 1962, made apparently before the contrary decisions in his own court referred to in our note 3, wherein the learned judge makes a ruling going somewhat along the way traveled by our brothers, though not so far. For he expressly refuses to pass upon a case arising under the new regulations of the Attorney General (discussed below and in the majority opinion) implementing and enforcing a unitary deportation procedure. But so far as the opinion goes, it shows a like hiatus in argument, as it starts with an initial stress upon the legislative intent to develop a simple complete system of review, as set forth in the Administrative Procedure Act, 5 U. S. C. §§1031-1042, and explicitly incorporated into our governing statute, 8 U. S. C. §1105a(a), and then proceeds to an interpretation of the statute which sets at naught the intent thus uncovered.

Why this is so and why our result is so confusing will become clear upon examination of the pertinent background. The Immigration and Nationality Act of 1952 contained provisions of an humanitarian nature authorizing the Attorney General to withhold deportation of an alien to a country where he would be subject to physical persecution, 8 U. C. §1253(h), and, in certain specified cases of

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dant had shown enough to justify transfer at this juncture and afford this court opportunity to pass on the question of its own jurisdiction. In the present case Foti's petition for review was filed, after dismissal upon consent, of his action below in the Southern District of New York after Judge Murphy had refused a preliminary injunction on the ground that the District Court no longer had jurisdiction of the action. Thus after a rather dizzy runabout, Foti now finds himself back where he started, but with a consent judgment against him.

hardship to himself and family, to suspend deportation of an alien and adjust his status to that of one lawfully admitted for permanent residence, 8 U. S. C. §1254(a)(1)(5). As was obvious and, indeed, intended, these provisions have become of the utmost importance in deportation cases; and in an increasingly large number of cases, applications for withholding or suspension of deportation have been made and review of their denial has been sought in the courts. Consideration of such denials has become a major part of our activity in the deportation field and from the nature of things is likely to increase rather than otherwise. For these remedies afford a way of obtaining a temporary stay and under appropriate conditions a permanent status as resident of an alien who has no other legal ground for relief; the two cases here before us where the petitions had necessarily to admit deportability are good examples of the importance which this discretionary relief has now assumed. True, the legislative intent is to make this an executive, rather than a judicial, function, so far as possible, as indeed is its attitude with respect to immigration matters generally. But even though judicial assistance is not easily obtained, it is natural, in view of the stakes, that it should be regularly and persistently sought. It is not conceivable that these well known facts were not known to the sophisticated subcommittee on Immigration and Nationality of the House Judiciary Committee and its Chairman, Representative Walter, who have sponsored all the important legislation in this field. And it would be strange, indeed, if in their 1961 legislation as to review they conspicuously omitted any provision for this now vastly important aspect of deportation litigation.

Actually the history of the 1961 legislation shows pretty conclusively that there was no such omission. Improvement in the form of deportation review had been under consideration for some time. As early as 1954 the Attorney General had proposed legislation similar to that eventually passed, and bills in fact passed the House in 1958, 1959, and earlier in 1961. This history is traced in a perceptive Comment, *Deportation and Exclusion: A Continuing Dialogue between Congress and the Courts*, 71 Yale L. J. 760-792 (1962). In all the legislative activity there was expressed the purpose of reducing the existing complicated procedure to a simple system of direct review by the courts with decisive power, namely, the courts of appeals. Particularly stressed was the need to prevent the long delays possible under existing procedure "by repetitive appeals to the busy and overworked courts." H. R. Rep. No. 1086, 87th Cong., 1st Sess., Aug. 30, 1961, to accompany S. 2237, 2 U. S. Cong. & Adm. News (1961) 2950, 2967, and see also H. R. Rep. No. 565, 87th Cong., 1st Sess. (1961); 71 Yale L. J. 760 n. 4 (1962). This is emphasized by the strong support given the proposed legislation from President Eisenhower (who called for its enactment in 1956 and 1957, 2 U. S. Cong. & Adm. News, *supra*, 2967, 2968) through the Department of Justice (Letters of Deputy Attorney General Walsh and of Deputy Attorney General White, March 30, 1959, and April 18, 1961, 2 U. S. Cong. & Adm. News, *supra*, 2968-2969) to the Judicial Conference of the United States, which endorsed the various bills on several occasions. 1959 Ann. Rep. of the Proceedings of the Jud. Conf. of the U. S. 8;

1960 Ann. Rep. 30, 31; 1961 Ann. Rep. 18, 78, 79 (meetings of March and Sept. 1961).[4]

The legislative committees, recognizing that the right of habeas corpus must be preserved, as it is in 8 U. S. C. §1105a(a)(9), took steps reasonably designed to carry out their intent consistent with this preservation. Thus the statute provides that no deportation order shall be reviewed unless the alien has exhausted his administrative remedies, that every petition for review or for habeas corpus must state whether the order had been upheld in any prior judicial proceedings, and, if so, the circumstances, and that no such petition shall be entertained if the order's validity had been sustained in any prior judicial proceeding unless it presents grounds which the

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[4] Thus see 1959 Ann. Rep. 8:

"(3) *H. R. 2807, 86th Congress, to authorize a new type of judicial review of administrative orders for the deportation of aliens from the United States, which, except as to aliens in custody, would be exclusive.*—This proposal would permit an alien to file a petition for the review of a deportation order in a United States Court of Appeals within six months from the date of the final order. In so doing, the bill implements and applies Section 10 of the Administrative Procedure Act, and, with some exceptions, makes the procedure of the Hobbs Act (5 U. S. C. 1031 et seq.) applicable to the judicial review of deportation orders. The review would be had upon the administrative record upon which the order was based, and the Attorney General's findings of fact, if supported by reasonable, substantial and probative evidence on the record considered as a whole, would be conclusive. The right of any alien in custody to petition for a writ of habeas corpus would be preserved. The Committees [on Court Administration and Revision of the Laws] stated that the proposal is intended to do away with delays which heretofore had been encountered as a result of repeated litigation in deportation proceedings, some of which had been carried on for many years. On recommendation of the Committees, the Conference approved the bill."

The later reports cited referred back to and reiterated this approval.

court finds could not have been presented in the earlier proceedings or that remedy was inadequate or ineffective to test the validity of the order, 8 U. S. C. §1105a(c). All review must be upon the administrative record before the Attorney General unless an issue which is not frivolous is made as to nationality, when the case may be remitted to a district court for hearing *de novo* on this issue of fact, 8 U. S. C. §1105a(a)(4)(5). And a limitation is set upon petitions for review of six months from the date of the final deportation order or the effective date of the statute (Oct. 26, 1961). 8 U. S. C. §1105a(a)(1).

This carefully devised legislation is superimposed upon already existing law providing for extensive departmental hearings before hearing officers under procedure in accordance with regulations to be prescribed by the Attorney General. "The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien." 8 U. S. C. §1252(b)(4). As showing the absence of limitation on the inquiry officer's authority the first sentence of this subdivision is significant: "A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, • • • and, as authorized by the Attorney General, shall make determinations, *including* orders of deportation." (Italics supplied.) 8 U. S. C. §1252(b).[5] Pursuant to the authority

[5] These provisions make doubly significant the venue of the new petition for review "in the judicial circuit in which the administrative proceedings before a special inquiry officer were conducted *in whole or in part*" (italics supplied), or in the circuit of the petitioner's residence, but not in more than one. 8 U. S. C. §1105a(a)(2). Obviously the legislative committees knew the parts into which the deportation proceedings may divide. And the implication of a single unitary review is obvious.

given, the Attorney General has adopted regulations providing in detail for the initiation of proceedings before the special inquiry officer down through an appeal to the Board of Immigration Appeals and carefully safeguarding the procedural rights of the alien. 8 C. F. R. §242.1 *et seq.* Secs. 242.8 and 242.17, adopted in 1957 and extended by amendment Dec. 19, 1961, give the inquiry officer full authority to hear and determine all these applications for discretionary relief we are now considering, and §242.17(d) as now amended provides: "An application under this section [i.e., for all the various types of discretionary relief here specified] shall be made *only during the hearing* and shall not be held to constitute a concession of alienage or deportability in any case in which the respondent does not admit his alienage or deportability." (Italics supplied.) And by §242.18 the decision of the special inquiry officer is required to include a discussion of the evidence and findings as to deportability and of the evidence pertinent to any application for discretionary relief under §242.17 and the reasons for granting or denying the relief. "The decision shall be concluded with the order of the special inquiry officer."

Thus the Attorney General has recognized and reenforced the unitary nature of the entire deportation proceeding in regulations which have the force and effect of law. *United States ex rel. Accardi* v. *Shaughnessy,* 347 U. S. 260, 265. Obviously it will be most difficult and inconvenient to disentangle and divide up the inquiry officer's one decision and order so that it may be subjected to different forms of piecemeal review. Our brothers have no suggestion as to how this difficulty will be met. There

are other difficulties they do not discuss arising from the six months' time limitation and the requirement that all administrative remedies be satisfied. Suppose an alien against whom a deportation order has been entered wishes to seek its reopening for the consideration of some new evidence and also to ask for hardship relief. According to the provisions just discussed he must ask for both together and before filing his petition for review, though meanwhile the six months' period of limitation is apparently running against him. His situation may well be precarious. See 71 Yale L. J. 760, 762-764 (1962) and the extract therefrom quoted in note 7 *infra*. Of course none of these difficulties arise under the view we are supporting.

The interpretation which our brothers find necessary rests at bottom upon four statutory words, viz., "final orders of deportation," and in last analysis is only an interpretation of "final."[6] This phrase occurs in 8 U. S. C. §1105a(a) referring back to 8 U. S. C. §1252(b), which we have already cited. There is nothing in this latter statute which expressly excludes the interpretation we make; indeed there is support for it, as we have stated. Moreover we believe the practicalities and natural analogies point that way. Involved here are decisions on applications to suspend or stay the operation of the deportation order. When a like application is made as to a "final judgment" in an ordinary civil action, the judgment is naturally stayed until the application is disposed of. F. R. 73(a); and see *Leishman* v. *Associated Wholesale Electric Co.*, 318 U. S.

[6] If there is, indeed, compulsion in this word or phrase, it would seem to press in the opposite direction from that taken by our brothers, namely, to the really ultimate step, the issuance of the final warrant commanding deportation. But, presumably because of the obvious unworkability of this meaning in the general statutory setting, no one appears to support this view.

203. As is well understood, here included are a wide variety of motions, such as those to make or amend findings, to alter and amend the judgment, and for a new trial. Consideration of these motions does not impugn the settled regard for finality of judgments in civil procedure; it is indeed difficult under the statutory language and even more under the practical compulsion of all the present circumstances to see why that analogy is not persuasive here. Perhaps the situation could not be more neatly put than in the following quotation from *Blagaic* v. *Flagg, supra,* 7 Cir., 304 F. 2d 623, 625: "If the withholding of deportation is not granted, petitioner will be deported; thus, in a realistic sense the denial of a stay is a part of the deportation order."

Our brothers finally resort to the "old-fashioned" but hoary and illusory, principle of "reading Congressional language to mean what it says." "But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary," said our late great colleague Learned Hand in a famous passage, *Cabell* v. *Markham,* 2 Cir., 148 F. 2d 737, 739, quoted in *Markham* v. *Cabell,* 326 U. S. 404, 409, affirming the decision below. This admonition seems particularly in point as to matters of procedural detail, which are only a means to an end where rigid formalism tends to defeat their own purpose, and not an end in themselves. Here the announced principle seems meaningless. It is doubtful if a layman without personal experience would know what "deportation' legally signifies; and if he had knowledge, he would hardly assume that the "proceedings" were at an end before the now so important steps to secure discretionary relief are begun. And as we have pointed out, to a lawyer a

final judgment does not mean what it is here made to mean. Our brothers also refer to a variety of makeweight considerations which for the most part are not established and even if established would not weigh against the Congressional intent. We are given no figures as to the volume of litigation, present or prospective; in view of the delay now so easily to be secured by pressing steps under the divided procedure here forced upon us, it seems hardly doubtful but that our appellate work will be sharply increased, rather than otherwise. Whatever nuances of legal principle may distinguish the review of the order of deportation from that of denials of discretionary relief, certainly experienced circuit judges may work out the law as easily where entry to their court has been by way of petition for agency review as where it has been by appeal from the district court. And the desire to give "the alien greater rights, greater security, and more assurance of a close study of his case by experienced judges," 2 U. S. Cong. & Adm. News (1961) 2972, would seem to apply as much to the orders now under consideration as to any others in view of the great importance that they now have in deportation proceedings. All this seems quite unpersuasive.

We have referred to the legislative history, which is convincing as to the view we are stating. But yet to be recounted is one item which is quite conclusive as to the legislative intent. That is the colloquy on the floor when the legislation passed the House in 1959. That colloquy is fairly recounted by our brothers in their opinion, although they attempt to discredit its meaning and effect. But such discrediting does not seem possible. Recall the participants: Chairman Walter, the legislative leader in all this area;

his assistant and committee reporter, Congressman Moore; and, asking the important questions, Representative Lindsay, who was thoroughly cognizant of the problem by having represented the government in *Jay* v. *Boyd*, 351 U. S. 345—the now controlling case as to review of this type of orders, Recall also the repeated assurances that "The final order means the final administrative order," and that the " 'final deportation order' does not take effect until after determination of the question of suspension," with the ultimate statement of Chairman Walter himself "that the 6 months' period on the question of finality of an order applies to the final administrative adjudication of the application for suspension of deportation just as it would apply to any other issue brought up in deportation proceedings." 105 Cong. Rec. 12728. It was on this assurance that the bill was passed. Here literally the words must mean what they say, as an informed commentator concludes, 71 Yale L. J. 760, 763, 764 n. 20 (1962),[7] and we are content to accept and act on this view.

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[7] "Section 1(a)(1), H. R. 187, 75 Stat. 651 (1961), 8 U. S. C. A. §1105a(a)(1) (Supp. 1961). H. R. 187 allows six months from the date of the final deportation order in which to bring a petition for review. The determination of when an order becomes final has always been important because of the need to exhaust administrative remedies before seeking judicial review, a requirement retained in section (c) of the bill, 75 Stat. 653 (1961), 8 U. S. C. A. §1105a(c) (Supp. 1961). The determination of finality is made vital by the combination of the statute of limitations and the requirement of exhausting administrative finality. During the House debate on H. R. 2807, 86th Cong., 1st Sess. (1959), the author, Representative Walter, and the committee reporter, Representative Moore, agreed to a statement by Representative Lindsay that 'if there is any remedy on the administrative level left of any nature, that the deportation order will not be considered final.' 105 Cong. Rec. 12728 (1959). It was also stated that 'final' meant after a determination of suspension of deportation. *Ibid.* * * * " 71 Yale L. J. 760, 763, 764 n. 20 (1962).

Indeed our brothers' attempt to dull the impact of these enlightening responses is decidedly forced. Thus they imply that the legislators were avoiding the difficulty of the imposed statute of limitations by holding the six months' period for filing the review petition only suspended or erased by the filing of the application for discretionary relief. That is far from what the legislators said; and the results of such a statutory interpretation would surely be dubious and bizarre. Consider the example instanced above of a filing of a joint motion to reopen and application for discretionary relief. As we have seen, denial of the motion must go to the court of appeals, *Dentico* v. *Immigration and Naturalization Service, supra,* 2 Cir., 303 F. 2d 137, while denial of the application is now to be reserved for district court action. How long are the proceedings to be held in abeyance by these procedural steps? Suppose the motion and application are filed a day before the expiration of six months after the entry of the deportation order and are not determined for, say a year. Does the alien then still have time to file his review petition? If so, does he have six months or only a day in which to act? And when should he institute his district court action? On these matters, where in all fairness the alien should have a clear expression of and timely warning as to his right, the answers would be left hopelessly obscure. And the opportunities for delay and special treatment if the alien times his moves shrewdly are obvious.

Again our brothers guess—with no real knowledge—that only a few members of the House were present to hear the colloquy. We question the propriety of thus attempting to impugn the action of a co-ordinate arm of government; in any event the observation even if possibly well based has

little pertinence to the issue. Had this debate not settled the question for the legislators, it would surely have been raised again in the final two years of strenuous debate on other portions of the legislation before the statute was enacted. Thus the very weakness of the answers suggested tends to prove the point as to the colloquy itself.

Hence it is difficult to perceive the reasons why our brothers have chosen the view they now adopt and press. It has been said that there is a continuing debate between Congress and the courts over immigration and nationality legislation, with the latter pressing the humanitarian approach as against the sterner legislative view. 71 Yale L. J. 760 (1962). Be that as it may, it is hard to see how humanitarian reasons can be resorted to here to limit the meaning of the statutory enactments. In view of the unusually distinguished support, cited above, which the legislation brought out, we surely must hesitate to be certain that it is actually inimical to the interests of aliens. And we cannot shut our eyes to the vigorous, even bitter, debate within and without the halls of Congress in 1961 as to whether the review provisions of the act created undue hardship for the alien.[8] After such a thorough consideration by the legis-

[8] This is recounted with full citations in 71 Yale L. J. 760 n. 3, 762 nn. 2-4 (1962). Included are references to a debate in the weekly *New Republic* involving Representative Walter, Assistant Attorney General Katzenbach, and the editors, coming finally to the question, "Did the New Republic misrepresent Francis Walter's Bill?" Objection centered chiefly on the increased cost and inconvenience of applying to a court of appeals for review, and on the short statute of limitations, with the contention that the act will affect chiefly aliens with limited resources. It is said that many of those opposed were induced finally to vote for the Conference Report because of their desire to achieve passage of the alien orphan program and other humanitarian provisions which had been added to the original bill. *Ibid.* Of course the additional possibilities for delay afforded under the present decision will give increased opportunities for litigation to aliens of means.

lators charged with the major responsibility in the premises, it is a question how far the courts may assume the role of knight-errant to correct assumed unfairnesses.

The question becomes the more pressing when we see the increased confusion and labor for the courts and litigants now impending and appreciate that the one clear result of the statutory reform under court amputation is now only to add extensive delay—of surely a year or more—to an already delaying procedure. Is it a boom to an alien, doomed eventually to be deported, to gain some more time while the doom continues to hang over him? And yet we perceive no other practical reason for the narrowing construction of a remedial statute here advanced. Hence we think the statutory purpose should be carried out. We believe we have jurisdiction to adjudicate Foti's petition on the merits and should proceed to do so.

APPENDIX B

Judgment—United States Court of Appeals

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-first day of September, one thousand nine hundred and sixty two.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,
HON. CHARLES E. CLARK,
HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
HON. THURGOOD MARSHALL,
Circuit Judges.

FRANCESCO FOTI, a/k/a FRANK FOTI,
Petitioner,

–v.–

P. A. ESPERDY, as District Director of the Immigration and Naturalization Service, New York District,
Respondent.

Appendix B—Judgment of United States Court of Appeals

A petition for review of an order of the Immigration and Naturalization Service,

This cause came on to be heard on the administrative record of the Immigration and Naturalization Service, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the petition be and it hereby is dismissed for lack of jurisdiction.

A. DANIEL FUSARO
Clerk

APPENDIX C

Statutes

8 USCA §1105a Judicial review of orders of deportations and Exclusions—Exclusiveness of Procedure

(a) The procedure prescribed by, and all the provisions of Sections 1031-1042 of Title 5, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under Section 1252(b) of this title or comparable provisions of any prior Act, except that—

(1) a petition for review may be filed not later than six months from the date of the final deportation order or from the effective date of this section, whichever is the later.

(2) the venue of any petition for review under this section shall be in the judicial circuit in which the administrative proceedings before a special inquiry officer were conducted in whole or in part, or in the judicial circuit wherein is the residence, as defined in this chapter, of the petition, but not in more than one circuit;

(3) the action shall be brought against the Immigration and Naturalization Service, as respondent. Service of the petition to review shall be made upon the Attorney-General and upon the official of the Immigration and Naturalization Service in charge

of the Service District in which the office of the clerk of the court is located. The service of the petition for review upon such official of the Service shall stay the deportation of the alien pending determination of the petition by the Court, unless the Court otherwise directs;

• • • • •

8 USC §1254 Suspension of Deportation—Adjustment of Status for Permanent Residence

(a) As hereinafter prescribed in this section, the Attorney-General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who—

• • • • •

(5) is deportable under paragraphs (4)-(7), (11) (12), (14)-(17), or (18) of Section 1251(a) of this title for an act committed or status acquired subsequent to such entry into the United States or having last entered the United States within two years prior to, or at any time after June 27, 1962, is deportable under paragraph (2) of Section 1251(c) of this title as a person who remained longer in the United States than the period for which he was admitted; has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; has

not been served with a final order of deportation issued pursuant to this chapter in deportation proceedings up to the time of applying to the Attorney-General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney-General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence.

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IN THE

Supreme Court of the United States

October Term, 1962

No. 28

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FRANCESCO FOTI a/k/a FRANK FOTI,

Appellant,

—vs.—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

APPELLANT'S BRIEF

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—vs.—

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Respondent.

APPELLANT'S BRIEF

Preliminary Statement

This appeal is predicated upon the sole issue granted in the petition for certiorari before this court; the said petition having been filed October 20, 1962, and the Certiorari having been granted January 7, 1963.

Issue

Whether or not the Circuit Court of Appeals has jurisdiction to review the final orders of the Special Inquiry Officer authorized by the Attorney General to be made during the course of deportation proceedings?

ARGUMENT

I

The Circuit Court of Appeals has jurisdiction to review final orders of the Special Inquiry Officer.

It is respectfully submitted that Congress pursuant to Public Law 87-301 included in Section 5(a) the power to review all final orders made by the Special Inquiry Officer of the Immigration and Naturalization Service, a division of the Attorney General's Department. That section amended the Immigration and Nationality Act by adding to it a new section 106 entitled "Judicial Review of Orders of Deportation and Exclusion", 8 U.S.C.A. (1962 Pocket Part) §1105a.

The said section 1105a provides the procedural steps and all the provisions of 5 USC §§1031-1042 "shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the limits of the United States pursuant to administrative proceedings under section 242(b) of this Act, (8 USC §1252(b)) or comparable provisions of any prior act". This present matter is without the nine special exceptions cited in the said 5 USC §§1031-1042.

There have been a number of decisions upholding the jurisdiction of the Court of Appeals, such as *Blagaic* v. *Flagg*, Seventh Circuit, 304 F. 2nd 623 (1962) and in the same circuit, *Roumeliotis* v. *I.N.S.*, 304 F. 2nd 453 (1962), and in the latter case the attorney-general's objections were overruled.

However, Mr. Justice Edelstein in the matter of *Zupicich* v. *Esperdy*, S. D. N. Y., 61 Civ. 1271, filed July 12th, 1962, whose opinion referred to two decisions arrived at in the ninth circuit, *Giova* v. *Rosenberg*, No. 17,655, June 15, 1962, and *Mai Fai Fong* v. *Immigration and Naturalization Service*, 17, 723, June 28, 1962, whereby jurisdiction was upheld, stated in his *Zupicich* case (cited *supra*) that the court of appeals had jurisdiction.

It is respectfully submitted in the Seventh and Ninth Circuits the Court of Appeals have upheld the jurisdiction pursuant to the new congressional enactment. The lower court in the Second Circuit has stated that jurisdiction properly appertains to the court of appeals. The history of the case at bar reflects the said attitude of the District Court in the Second Circuit. Predicated upon such authorities and legislative enactment it is inescapable that the court of appeals has jurisdiction.

II

Conclusion

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed and the cause remanded to the court of appeals for a review.

Respectfully submitted,

CALLY & CALLY
Attorneys for Appellant

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 544

FRANCESCO FOTI A/K/A FRANK FOTI, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

1. The first question presented by the petition is whether denial of an application to suspend the deportation of an alien concededly deportable is a "final order of deportation" directly reviewable by a court of appeals under Section 106 of the Immigration and Nationality Act. 75 Stat. 651, 8 U.S.C. (Supp. III) 1105a. On rehearing *in banc*, the court below, four judges dissenting, held it was not. The Ninth Circuit agrees. *Peter Holz* v. *Immigration and Naturalization Service*, November 1, 1962 (C.A. 9) (appeal from denial of application to withhold deportation under § 243(h) because alien would be subject to physical persecution). *Per contra*, as the Second and Ninth Circuits expressly recognize, the Seventh Circuit holds that denial of discretionary remedial relief is directly

reviewable by the court of appeals. *Blagaic* v. *Flagg*, 304 F. 2d 623 (C.A. 7) (appeal from denial of application to withhold deportation under § 243(h)). See also *Roumeliotis* v. *Immigration and Naturalization Service*, 304 F. 2d 453 (C.A. 7), petition for certiorari pending, No. 434 (appeal from denial of first preference immigration visa under § 203(a)(1)(A)).* In view of the significant volume of litigation by deportable aliens contesting orders denying requests for discretionary relief, it is important to the government, as to the aliens, that the conflict in decisions as to the proper forum for review be authoritatively resolved. Accordingly, the United States agrees that certiorari should be granted as to the first question presented by the petition.

2. In our view, however, this Court should not now undertake direct review of the merits. Once it is determined whether the court of appeals or the district court has jurisdiction of these proceedings, petitioner may seek initial review in the proper forum. The United States accordingly opposes the granting of the petition for certiorari as to the second question.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

NOVEMBER 1962.

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* The petition for a writ of certiorari in the *Roumeliotis* case, seeking only a stay of deportation pending action on a private bill, does not raise any question as to the denial of the first preference visa. Accordingly, the government has expressed the view that the case does not appropriately present the jurisdictional issue for resolution.

U.S. GOVERNMENT PRINTING OFFICE: 1962

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 544

FRANCESCO FOTI a/k/a FRANK FOTI, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENT

The issue in this case, as limited by the order granting certiorari, is whether denial of an application to suspend the deportation of a concededly deportable alien is a "final order of deportation" directly reviewable by a court of appeals under Section 106 of the Immigration and Nationality Act, as added by Public Law 87-301, § 5(a), 75 Stat. 651, approved September 26, 1961, 8 U.S.C. (1958 ed.,

Supp. IV) 1105a.[1] Since the grant of the writ, it has come to our attention that Congress, on October 24, 1962 (four days subsequent to the filing of the petition for certiorari), enacted a statute, Public Law 87-885, 76 Stat. 1247, the fourth section of which amended Section 244 of the Immigration and Nationality Act so as to provide, in pertinent part, in a new subsection, (f), as follows (8 U.S.C. (1958 ed., Supp. IV) 1254(f)):

> (f) No provision of this section shall be applicable to an alien who (1) entered the United States as a crewman; * * *.

Section 244 is the source of the Attorney General's discretionary authority to suspend the deportation of aliens who meet the eligibility requirements prescribed in the section. It is undisputed that petitioner entered the United States as a crewman (R. 1-2, 8). This memorandum is filed in order to bring the changed circumstances to the Court's attention and to consider the question whether the case continues to present a live controversy.

1. The relevant facts in this litigation are as follows:

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[1] As pointed out in the government's memorandum acquiescing in certiorari, the court below and the Ninth Circuit are of the view that relief must be sought from the district court, whereas the Seventh Circuit has held that the Attorney General's denial of discretionary relief under the immigration laws is directly reviewable in the court of appeals. The issue continues to arise in variant forms. See, *e.g.*, *Giova* v. *Rosenberg*, October Term, 1962, No. 898 Misc., petition for certiorari pending.

Petitioner, whose deportability is undisputed (R. 1, 8), applied at his deportation hearing for the privilege of suspension of deportation under Section 244 as it read at the time of the hearing (June 9, 1961). The special inquiry officer denied the application on the ground that petitioner failed to qualify under the "hardship" test prescribed by subsection (a) (8 U.S.C. 1254(a)) and hence was ineligible for such relief.[2] The Board of Immigration Appeals affirmed this determination (R. 1-3).[3] Petitioner thereafter applied to the Court of Appeals for the Second Circuit, under Section 106 of the Act, 8 U.S.C. (1958 ed., Supp. IV) 1105a, for review of the administrative determination. That court, holding that it was without jurisdiction for the reason that the challenged determination was not a "final order of deportation" within the meaning of Section 106, dismissed the petition (R. 8-35, 36). The pending writ was issued to review this judgment (R. 37).

2. If it were undisputed or clear beyond peradventure that the relief sought by petitioner could no longer be granted because of a supervening act of Congress, it would be appropriate to vacate the judgment below and to remand the cause with instructions

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[2] The special inquiry officer further held—as an alternative basis for his order of denial—that, even if minimum eligibility requirements were assumed for purposes of the decision, the relief sought should in any event be denied as a matter of discretion.

[3] The Board did not consider the special inquiry officer's alternative basis of denial (see preceding footnote). It simply held petitioner ineligible for the relief sought (R. 2, 3).

to dismiss the petition for review as moot, *United States* v. *Munsingwear*, 340 U.S. 36. If, however, there is an arguable issue on the merits, *i.e.*, on the question whether petitioner may still be eligible for the relief which he seeks, it would seem to be the orderly course for this Court to consider the jurisdictional issue which it has already undertaken to review and to pretermit all other issues.

Several considerations support this conclusion. First, there is the precept, almost invariably followed, that if there is a threshold question as to jurisdiction, the federal courts will dispose initially of that issue. Second, there is the consideration that the lower court in this case has not gone beyond the jurisdictional question, and ordinarily this Court will not reach out to decide issues on the merits which the lower courts have not yet had an opportunity to consider. Third, the jurisdictional issue is a recurrent one that it would be provident to decide even though it were deemed rather unlikely that this particular petitioner will be able to prevail on the merits.

3. We turn therefore to the question whether it is clear beyond peradventure that petitioner is barred from obtaining relief by the 1962 amendment of Section 244. Under the plain language of that amendment, the Attorney General no longer has authority to grant suspension of deportation to aliens who entered this country as crewmen. Since petitioner is in that class, he is ineligible unless the saving clause of the Immigration and Nationality Act of 1952 applies to the application for suspension of deportation here involved. Certainly, if the saving clause is

not applicable, petitioner cannot prevail even if it be assumed, *arguendo*, that the Attorney General erred when he failed, at an earlier date, to grant suspension of deportation. Cf. *Ziffrin, Inc.* v. *United States*, 318 U.S. 73, 78; *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U.S. 538, 541-542; *Duplex Co.* v. *Deering*, 254 U.S. 443, 464; *The Peggy*, 1 Cranch 103, 110; *Fassilis* v. *Esperdy*, 301 F. 2d 429, 431-434 (C.A. 2), affirming 192 F. Supp. 84, 86-87 (S.D.N.Y.); *United States ex rel. Wiczynski* v. *Shaughnessy*, 185 F. 2d 347, 349 (C.A. 2). And see *United States* v. *Alabama*, 362 U.S. 602.[4]

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[4] In *Ziffrin, Inc.* v. *United States, supra*, the question was whether the Interstate Commerce Commission, in passing upon an application for a contract carrier permit, was required to give effect to a change in the law which became effective subsequent to the filing of the application and the hearing thereon, but prior to the entry of the Commission's order. Holding that the Commission was bound to give effect to the law as it stood when the Commission acted, the Court said (318 U.S. at 78):

> It is unnecessary, however, to decide whether the Commission correctly applied §210 [of the Motor Carrier Act] as originally enacted to such common control as the Commission found in appellant and Ziffrin Truck Lines, Inc. We are convinced that the Commission was required to act under the law as it existed when its order of May 29, 1941, was entered. The [contract carrier] permit was effective for the future and the amendment forbade persons under common control holding both a permit and a certificate [as a common carrier]. * * * A change in the law between a nisi prius and an appellate decision requires the appellate court to apply the changed law. [Citing cases.] *A fortiori*, a change of law pending an administrative hearing must be followed in relation to permits for future acts. Otherwise the administrative body would issue orders contrary to existing legislation.

Petitioner, we presume, would argue that, since the 1962 amendment involved a change in the basic 1952 statute, Congress intended the saving provision of the latter Act to apply. This provision (§ 405(a), 66 Stat. 280, 8 U.S.C. 1101, Note) reads as follows:

> Sec. 405.(a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes [*sic*], conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. * * * An application for suspension of deportation under section 19 of the Immigration Act of 1917, as amended, * * * which is pending on the date of enactment of this Act, shall be regarded as a proceeding within the meaning of this subsection.
>
> * * * *

Although the saving provision is comprehensive in scope, it should be noted that it speaks in terms of "this Act" and "the time this Act shall take effect,"

i.e., December 24, 1952.[5] Moreover, it refers specifically to "application[s] for suspension of deportation *under section 19 of the Immigration Act of 1917, as amended*" (emphasis added)—stating that any such application which "is pending on the date of enactment of this Act" shall "be regarded as a proceeding within the meaning of this subsection." This specificity cuts against a contention that Congress meant the saving provision to apply to future applications for suspension of deportation arising under the 1952 Act in the event that Act should be repealed or amended.

For the reasons summarized above, the government will vigorously argue, whenever the merits may ultimately be reached, that petitioner cannot obtain relief consistently with the 1962 amendment of Section 244. Nonetheless, we do not go so far as to contend that the question is plainly outside the realm of dispute and that this Court should therefore hold the case to be moot.

---

[5] See § 407, 66 Stat. 281.

CONCLUSION

We have brought to the Court's attention a possible question as to mootness. We respectfully suggest, however, that the cause should not be dismissed as moot and that this Court, rather than take any further action at this stage of the case, should proceed to receive briefs and hear argument on the jurisdictional issue which it has previously undertaken to review.

ARCHIBALD COX,
Solicitor General.

MAY 1963.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 28

FRANCESCO FOTI a/k/a FRANK FOTI, *Petitioner,*

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 544

FRANCESCO FOTI a/k/a FRANK FOTI, *Petitioner,*

v.

IMMIGRATION AND NATURALIZATION SERVICE, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT.

Pursuant to Rule 42 and Rule 44 of the Rules of this Court, the petitioner moves for leave to file a brief as an amicus curiae and for leave, after the filing of such brief, to argue orally its position on the merits of the case.

As grounds for these motions petitioner represents that it is a national organization of attorneys who specialize in the practice of immigration and nationality law and has among its concerns the procedures for obtaining judicial review of decisions of the Immigration and Naturalization Service.

The issue presented by the present case is whether under Section 106 of the Immigration and Nationality Act, 75 Stat. 651, 8 U.S.C. (Supp. III) 1105(a), Circuit Courts of Appeals have jurisdiction to review any order entered by the Immigration and Naturalization Service other than a "final order of deportation".

The petitioner urges here, and urged below, that the Court of Appeals has jurisdiction to review a denial of an application to suspend deportation. The Immigration and Naturalization Service urged below, and, petitioner is informed, will urge here, the identical position. The United States Court of Appeals for the Second Circuit in the decision below and the Ninth Circuit in *Peter Holz* v. *Immigration and Naturalization Service*, 309 F. 2d 452, *Mai Kai Fong* v. *Immigration and Naturalization Service*, 305 F. 2d 239, and *Giova* v. *Rosenberg*, 308 F. 2d 347, petition for certiorari pending, Miscellaneous No. 898, agree that there is no jurisdiction in the Court of Appeals to review any but final orders of deportation. In view of the fact that both parties before this Court are in disagreement with the decision below, the question of law before this Court cannot be adequately presented by these parties either in their briefs or in their oral argument.

The Solicitor General of the United States has consented to the grant of leave to the Association of Immigration and Nationality Lawyers to appear as amicus curiae. The petitioner, by counsel, has declined to consent to authorization for an intervenor in this matter, but has stated that he shall not oppose any application to this Court for leave of this petitioner to file a brief as amicus curiae and to participate in the oral argument.

WHEREFORE, It is requested that the Association of Immigration and Nationality Lawyers be granted leave to

file a brief as amicus curiae and to conduct oral agrument in the matter.

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Washington, D. C.,
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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 28

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IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

OPINIONS BELOW

The majority (R. 7-23) and dissenting (R. 24-35) opinions in the court of appeals, sitting *en banc*, are reported at 308 F. 2d 779.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 1962 (R. 36). The petition for a writ of certiorari was filed on October 20, 1962, and was granted on January 7, 1963 (R. 37; 371 U.S. 947). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. (1958 ed., Supp. IV) 1105a (a), which vests in the courts of appeals exclusive jurisdiction to review "all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this Act or comparable provisions of any prior Act," applies to a deportation order (issued pursuant to proceedings under Section 242(b)) in respect of which the issue of deportability is not in dispute, the basis of the challenge to the order being a claim that the administrative authorities erred in denying a form of discretionary relief from deportation which they had authority to grant.[1]

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of (1) Section 106 of the Immigration and Nationality Act, as added by Section 5(a) of Public Law 87-301, approved September 26, 1961, 75 Stat. 651 (8 U.S.C. [1958 ed., Supp. IV] 1105a), (2) Sections 242 and 243 of the same Act, 66 Stat. 208-214, 8 U.S.C. 1252, 1253, (3) Section 244 of the same Act as it read at the time of the deportation proceedings here involved, 66 Stat. 214, 8 U.S.C. 1254, (4) Section 244 as amended by Public Law 87-885, approved October 24, 1962, § 4, 76 Stat. 1247 (8 U.S.C. [1958 ed., Supp. IV] 1254), (5) Part 3 of Title 8 of

[1] The order granting certiorari (R. 37; 371 U.S. 947) limited the scope of the writ to question 1 presented by the petition, which reads: "Whether or not the Circuit Court of Appeals has jurisdiction to review the final orders of the Special Inquiry Officer authorized by the Attorney General to be made during the course of deportation proceedings." We have rephrased the question in a manner which in our view frames the issue more precisely.

the Code of Federal Regulations, (6) Parts 242 and 243 of Title 8 of the Code of Federal Regulations as they read at the time of the enactment of Section 106 of the Immigration and Nationality Act, *supra*, and (7) Part 242 as it now reads—appear in Appendix A, *infra*, pp. 57-88.

STATEMENT

Petitioner, a 47-year-old alien, a native and citizen of Italy, last entered the United States on or about November 16, 1950, on a seaman's visa, which authorized him to stay in this country for a period not to exceed 29 days (R. 1-2). He remained here illegally for more than ten years, leaving his wife and three minor children in Italy (R. 2, 8). On June 2, 1961, he was directed to appear before a special inquiry officer of the Immigration and Naturalization Service and show cause why he should not be deported under Section 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(2), as an alien who had unlawfully overstayed the period for which he had been admitted. On June 9, 1961, he appeared with counsel before a special inquiry officer, at a hearing regularly conducted under Section 242(b) of the Act (Appendix A, *infra*, pp. 62-64), conceded his deportability, and applied, in the alternative, for two forms of discretionary relief from deportation which the Attorney General was authorized by the Act to grant to deportable persons who met defined eligibility requirements (R. 1-2).

Pursuant to Section 244(a)(5) of the Act, as it then read[1] (Appendix A, *infra*, pp. 68, 71-72),[2] the alien requested the privilege of suspension of deportation on the ground that it would be difficult for him to earn a living for his family in Italy if he were deported (R. 2). Pursuant to Section 244(e) (Appendix A, *infra*, p. 74), he requested the privilege of voluntary departure at his own expense in lieu of deportation (R. 1). The special inquiry officer denied the application for suspension of deportation—on the ground that petitioner did not qualify for that form of relief by reason of failure to meet the "hardship" eligibility requirement imposed by Section 244(a)(5)[3]—but granted petitioner's alternative request for the privilege of voluntary departure (R. 1-3). On September

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[2] Section 244(a)(5) of the Act, as it then read, authorized the Attorney General to suspend the deportation of aliens in petitioner's situation (*i.e.*, aliens who were deportable under Section 241(a)(2) for having remained longer in the United States than the periods for which they had been admitted) if they could qualify for such relief under other eligibility requirements therein prescribed. Section 244 was subsequently amended so as (*inter alia*) to make aliens who entered the United States as crewmen ineligible for its benefits. The relevance of this amendment to the present case is discussed *infra*, at pp. 8-9.

[3] Among the eligibility requirements prescribed by Section 244(a)(5) was the requirement that the Attorney General be satisfied that deportation of the alien would result in "exceptional and extremely unusual hardship"—either to the applicant himself or to a close relative (spouse, parent or child) who was either a citizen or lawfully resident alien. The special inquiry officer, in addition to holding that petitioner failed to qualify for relief under this test, further held, as an alternative basis of denial of this form of relief, that, even assuming for purposes of the decision that petitioner met minimum eligibility requirements, the relief sought should be denied as a matter of administrative discretion (Appendix B, *infra*, p. 91).

19, 1961, the following order was entered (Appendix B, *infra*, p. 91):

> IT IS ORDERED that in lieu of an order of deportation respondent be GRANTED VOLUNTARY DEPARTURE without expense to the Government, within such time and under such conditions as the District Director shall direct.
>
> IT IS FURTHER ORDERED that if the respondent fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following order shall thereupon become immediately effective: respondent shall be deported from the United States in the manner provided by law, on the charge contained in the Order To Show Cause.

Petitioner appealed to the Board of Immigration Appeals from so much of the order of the special inquiry officer as denied his request for suspension of deportation. The Board, on November 28, 1961, dismissed the appeal (R. 1-3).[4] On the following day, November 29, the District Director for the New York District of the Immigration and Naturalization Service—in accordance with the special inquiry officer's order of September 19, 1961, *supra*—directed petitioner to effect his departure on or before December 18, 1961, and notified him that, in the event he failed to do so, his deportation to Italy had been directed (Appendix B, *infra*, pp. 92-93).

On or about December 15, 1961, petitioner commenced an action in the United States District Court

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[4] The Board stated that it agreed with the special inquiry officer's determination that petitioner was ineligible for suspension of deportation because of failure to meet the "hardship" requirement (R. 3). It did not refer to the alternative basis of the special inquiry officer's decision (see fn. 3, *supra*, p. 4).

for the Southern District of New York in which he sought declaratory and injunctive relief from the refusal by the Service to grant his request for suspension of deportation (see R. 6). The district court dismissed the action on the ground that under Section 106(a) of the Immigration and Nationality Act, as added by Public Law 87-301, § 5(a), approved September 26, 1961 (Appendix A, *infra*, pp. 57-61), the sole and exclusive procedure for the judicial review of such a determination was by a petition for review filed in an appropriate court of appeals (see R. 6).

On January 15, 1962, pursuant to Section 106(a), and in accordance with the district court's interpretation of the section, petitioner filed in the Court of Appeals for the Second Circuit a petition entitled "Petition to Review and Set Aside an Order of Denial of Suspension of Deportation" (R. 4-6), in which he sought judicial review of the Service's determination that he was ineligible for the privilege of suspension of deportation because of failure to qualify under the "hardship" test (R. 5-6). The government, while requesting dismissal of the petition on the merits, agreed with petitioner that the court had jurisdiction under Section 106(a) to hear it. On September 21, 1962, the court of appeals, sitting *en banc* and by a 5-4 vote, dismissed the petition for lack of jurisdiction (R. 7-36). It held that the term "final orders of deportation" does not include a denial of discretionary relief under Section 244(a)(5) even though the denial of that relief is embraced in a final order of deportation, thus remitting petitioner to a proceeding in the district court. It concluded, in effect, that an order of deportation is within the purview of Section 106(a) *only* if the petition for review challenges the underlying

adjudication of deportability. Should the petition for review challenge the determination of deportability *and* the denial of discretionary relief, the majority believed, "bifurcation of the road to review" might be required; *i.e.*, the court of appeals might be required to review the adjudication of deportability while the district court was reviewing the discretionary determination (R. 15). The majority acknowledged that this might be "inconvenient", and remarked that it "might be tempting" in such a situation "to take whatever liberties with the language of § 106(a) were needed to avoid" such a result (*ibid.*). But since the present case did not present that problem, the majority found it unnecessary to consider it further.[5]

The dissenting judges were of the view that the majority's construction was "artificially literal" (R. 24). Relying primarily on the legislative history of the section (R. 26-28, 32-35), they concluded that the majority's interpretation "frustrated the legislative purpose" and "saddled the litigants and the courts with a

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[5] It would be the government's position that, whatever may be the answer to the question presented by the present case (*i.e.*, whichever court—the court of appeals or the district court—has jurisdiction where deportability is not challenged and the sole basis of attack on the deportation order is the refusal to grant some form of discretionary relief), where the petition for review challenges both the determination of deportability and the denial of discretionary relief, the court of appeals has jurisdiction, under the principle of "pendent jurisdiction" (cf. *Hurn* v. *Oursler*, 289 U.S. 238; *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 380-381), to hear and determine the entire controversy. See *Lefson* v. *Esperdy*, 211 F. Supp. 769 (S.D.N.Y.), and *Pezzulich* v. *Esperdy*, unreported (S.D.N.Y., 60 Civ. 497, decided February 23, 1962), so holding.

complicating, overlapping, and delaying additional form of deportation review" (R. 24).[6]

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[6] As we advised the Court in our supplemental memorandum, filed May 22, 1963, calling to the Court's attention a possible question as to mootness, Congress, on October 24, 1962, subsequent to the court of appeals' decision and while the case was pending before this Court on petition for certiorari, enacted—effective as of the same date—Public Law 87-885, § 4, 76 Stat. 1247, providing (in relevant part) that Section 244 of the Immigration and Nationality Act—the source of the Attorney General's power to suspend the deportation of eligible classes of aliens—was amended by the addition of the following new subsection, (f) (Appendix A, *infra*, p. 78):

> (f) No provision of this section shall be applicable to an alien who (1) entered the United States as a crewman; * * *.

Since petitioner concededly entered the United States as a crewman, the government will argue, when the merits of this case are reached, that petitioner is now absolutely ineligible for the relief which he seeks, on a ground independent of that on which the administra-

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[6] In *Louie King Fong* v. *Immigration and Naturalization Service*, 308 F. 2d 191, the only other decision to our knowledge involving a factual situation precisely on all fours with the present case (*i.e.*, where the challenge was to the denial of an application for suspension of deportation, deportability not being in issue), the Ninth Circuit assumed, without discussion, contrary to the holding below in this case, that it had jurisdiction. Other lower court decisions, dealing with the applicability of Section 106(a) to various related types of orders and situations, will be referred to at appropriate points in the Argument.

tive authorities rested (*supra*, p. 4). We do not believe, however, for the reasons stated in our supplemental memorandum, that the amendment had the effect of mooting the *jurisdictional* issue, the sole question before this Court under the limited writ of certiorari, *viz.*, whether or not the court of appeals has authority under Section 106(a) to hear the merits. It is accordingly the view of the government, as stated in the supplemental memorandum, that the Court should, notwithstanding the amendment, hear and determine the latter issue.

SUMMARY OF ARGUMENT

I

The parties' construction of Section 106(a) is consonant with a literal reading of the words.

A. Section 106(a) gives to the courts of appeals exclusive jurisdiction to review "all final orders of deportation." The present case comes literally within the statutory words. Petitioner is seeking review of a final order of deportation. While it is the denial of his request for suspension which he challenges, and not the adjudication of deportability, the phrase "all final orders of deportation" applies to all such orders, whether the particular ground of challenge is that the determination of deportability is unfounded or that a request for discretionary relief was wrongfully denied. For, ever since the Attorney General was first given the statutory authority, in 1940, to grant discretionary relief, the power has in fact been exercised, under the governing regulations, prior to the entry of any deportation order—so that, where relief has been granted, this has been accomplished, not by canceling a previous-

ly issued order, but simply by not issuing such an order in the first instance.

Assuming that the regulations might have prescribed a different procedure—one under which a request for discretionary relief would not be considered until after a final order of deportation had been entered—we would urge that the order of deportation which was left in effect by the denial of relief subsumed the denial, and that the latter ruling would accordingly be reviewable under Section 106(a) as an incident of the order. This conclusion, while not required by the words of Section 106(a), would certainly do no violence to them. The majority's construction does them violence under the procedure actually followed, by cutting the phrase "final orders of deportation" down to adjudications of deportability, thereby inviting bifurcation of review of a single administrative proceeding between the circuit and district courts. The best guide for determining the congressional intent as to the scope of review under Section 106(a) would seem to be the familiar usages and practices which were actually followed when the section was enacted and which composed the context of the legislation.

B. Paragraph (4) of the "exceptions" to Section 106(a)—providing that the petition for review shall be determined solely upon the administrative record and that the Attorney General's findings of fact, if supported by substantial evidence, shall be conclusive—is not inconsistent with the parties' construction. This clause admittedly applies only to the adjudication of deportability. But it does not follow that the principal provision of Section 106(a) is also thus limited. The majority assumes that the scope of this subdivision of the section is coextensive with the principal enactment.

But there is nothing surprising in a congressional decision to include in an overall enactment dealing with the judicial review of all final orders of deportation a specific provision pertinent to the principal constituent of such an order—the determination of deportability.

II

The congressional intent that the judicial review procedures established by Section 106(a) should extend to *all* justiciable issues arising out of a deportation proceeding, including discretionary determinations and eligibility rulings made in connection therewith, is confirmed by the legislative history.

A. The declared purpose of the legislation was to eliminate district court review of "all questions which may arise in a deportation proceeding". The core of Congress's plan was to abbreviate the process of judicial review of deportation orders in order to frustrate certain practices, which had come to the attention of Congress, whereby persons subject to deportation were forestalling enforcement by dilatory tactics in the courts.

B. The legislative history also contains evidence of a specific intent to give the courts of appeals exclusive jurisdiction to hear any legal challenge to denials of discretionary relief. The case histories of abuse of the judicial review process, summarized in the committee reports, include references to litigation arising out of discretionary determinations. A reference chart reproduced in the reports shows that the denial of discretionary relief is a constituent part of the "final order of deportation." And a colloquy during the House debates further indicates a purpose to make discretionary rulings reviewable under the new legislation.

III

The subsidiary arguments relied on by the majority do not warrant its conclusion.

A. It is not "in the last degree unlikely" that Congress meant to require that discretionary determinations be initially reviewed by a court of three judges. The setting aside of an administrative determination on the ground of arbitrariness is a serious judicial function. Much of the litigation in this area, moreover, involves disputed eligibility issues and frequently presents pure questions of statutory construction. The majority's assumption, more importantly, cannot be squared with the declared purpose of Section 106(a) to eliminate one stage of the review process (the district court stage) in order to frustrate dilatory tactics.

B. The last-mentioned consideration also refutes the majority's suggestion that it is "incredible" that Congress meant to burden courts of appeals with review of orders denying voluntary departure.

C. 1. Contrary to the majority, it is not irrational to conclude that Section 106(a) did not extend, when enacted, to denials of withholding of deportation under Section 243(h) (anticipated physical persecution in destination country)—as we concede—while it did, and does, extend to denials of suspension of deportation under Section 244(a)—as we maintain. The modes of processing applications for these forms of relief were, when Section 106(a) was enacted, wholly different. The final order of deportation did not formerly reflect the denial of the application for Section 243(h) relief; such an application was determined subsequently by an official other than the special inquiry officer who presided at the deportation proceeding and entered the

final order of deportation. (As a result of a subsequent change in the regulations, a Section 243(h) application is now processed in the deportation proceedings and its denial is reflected in the final order.)

2. The majority's hypothetical question as to whether Section 106(a) extends to an order refusing to reopen a deportation proceeding—the issue in *Giova* v. *Rosenberg,* 308 F. 2d 347 (C.A. 9), pending on petition for certiorari, No. 15 Misc.—is concededly a difficult one. Although not literally a final order of deportation, such an order is nevertheless, in our view, so directly linked with the deportation proceedings which culminated in the deportation order that it should be deemed ancillary for purposes of review. But whether or not such an order is within the scope of Section 106(a), an order denying suspension of deportation should be deemed within its coverage, since it has always been considered an ingredient of the final deportation order and was unmistakably intended by Congress to be included. Even if Congress failed to achieve all of its purposes, the statute must nonetheless be ungrudgingly applied to the full extent that its language fairly permits.

ARGUMENT

I

THE PARTIES' CONSTRUCTION OF SECTION 106(A) IS CONSONANT WITH A LITERAL READING OF THE WORDS

A. Though petitioner does not challenge the determination of deportability, he is nevertheless seeking review of a final order of deportation

Section 106(a) of the Immigration and Nationality Act provides that the procedure prescribed by the Act of December 29, 1950, 64 Stat. 1129, as amended, 5 U.S.C. 1031 *et seq.* (the "Hobbs" Act)—by which the

courts of appeals are vested with exclusive jurisdiction to review final orders of certain designated federal agencies—shall apply to, and be the exclusive procedure for, judicial review of

> all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under Section 242(b) of this Act or comparable provisions of any prior Act * * *.

The present case comes literally within the statutory words. Petitioner is seeking review of a final order of deportation.[7] The challenge is not to the adjudication of deportability but to the denial of a discretionary exception; however, the phrase "all final orders of deportation" applies, literally, to all such orders, whether the particular ground or basis of challenge is that the determination of deportability is unfounded or that error was committed or discretion abused in the denial, during the Section 242(b) proceedings, of a request for discretionary relief. For, as we shall point out (*infra*, pp. 17-21), ever since 1940, when the Attorney General was first given the power to grant discretionary relief in deportation cases, the authority has

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[7] The special inquiry officer's order granting petitioner the privilege of voluntary departure was combined with a contingent directive that an order of deportation become "immediately effective," "without further notice or proceedings," if petitioner failed to depart when and as required by the district director (*supra*, p. 5). Upon petitioner's failure to depart within the time prescribed (*supra*, p. 5), the deportation order accordingly took effect. The petition for review, while denominated a petition for review of "an Order of Denial of Suspension of Deportation" (R. 4; *supra*, p. 6), was in substance and effect a challenge of the resulting final order of deportation as well (see, *e.g.*, R. 6).

in fact been exercised, under the governing regulations, prior to the entry of any deportation order—so that, where the relief sought has been granted, no such order has been entered. In other words, where relief has been granted, this has been accomplished not by canceling a previously issued order, but by refraining from entering such an order in the first instance.

We strongly disagree, therefore, with the suggestion in the majority opinion below (see, *e.g.*, R. 9, 10, 17, 18, 19, 22) that only its interpretation is consistent with the natural meaning of the words. The court held, in effect, that it would not review the order of deportation because the ground for challenge was not that the adjudication of deportability was wrong but that deportation should have been suspended under a discretionary exception. Thus, were it not for the point next to be noted, we would feel warranted in urging that it is the court below that has distorted the plain meaning of the words by implying what the language nowhere suggests.

Judge Friendly's opinion reasons, however, that the administrative practice of determining the question of deportability and ruling on any application for discretionary relief in a single proceeding—culminating in a final order of deportation where the decision goes against the alien in both respects—is not required by the statute. The Attorney General's regulations, in other words, *could* have provided that an application for discretionary relief would not be considered until after a final order of deportation had been entered. The order would then be canceled or left standing depending upon the ruling. Assuming that such a procedure would have been permissible under

the statute,[7a] we would urge that had such been the practice, the order which was left in effect by the denial of relief subsumed the denial, and that the latter determination would accordingly be reviewable under Section 106(a)—to the extent that it was subject to judiciary scrutiny—at the same time as the adjudication of deportability (if that was challenged). This conclusion, we concede, would not be required by the words, but it would do no substantial violence to them. (See on this point the discussion by Judge Clark at R. 31-32.)

Perhaps the fairest appraisal, therefore, is that while our interpretation might put some strain on the words of Section 106(a) under a procedure that *might* be followed, Judge Friendly's construction does them violence under the procedure actually followed, by cutting the phrase "final orders of deportation" down to adjudications of deportability, thereby inviting bifurcation of review of a single administrative proceeding between the circuit and district courts (R. 15). Splintering of the process of judicial review, we suggest, would be particularly unfortunate inasmuch as the prevailing administrative practice permits concurrent disposition of the various issues in a deportation case and thus avoids any practical necessity or justification for a series of appeals. See *infra* pp. 41-46.

In determining which of the two plausible construc-

[7a] But see former Section 244(a) (Appendix A, *infra*, pp. 68-72), requiring, as to all but one of the classes of aliens therein made eligible for suspension of deportation (defined in five numbered paragraphs), that the applicant shall *not* have been served with a final order of deportation under the 1952 Act. Paragraph (1), which did not contain this restriction, expired by operation of law in 1957, prior to the enactment of Section 106(a). As amended on October 24, 1962, Section 244(a) no longer contains this limitation (Appendix A, *infra*, pp. 74-75).

tions is to be adopted, the best guide to the congressional meaning would seem to be the usage and practices that composed the context of the legislation. Certainly, the close supervision that congressional committees exercise over the administration of the immigration and nationality laws justifies the inference that they were familiar with the prevailing usages and therefore used the term "final orders of deportation" advisedly.

It should be noted initially that, prior to 1940, the Attorney General had no discretion with respect to the deportation of an alien who came within a defined category of deportable persons. The expulsion of such a person was mandatory; his only avenue of relief, in a hardship case, was by private bill. Accordingly, any differentiation that might have been made prior to 1940 between a determination by the Attorney General that an alien was *deportable* and the order directing his *deportation* would have been merely formalistic. In fact, the determination of deportability necessarily resulted in, and was invariably accompanied by, a deportation order.

This situation, however, was fundamentally changed by the enactment, on June 28, 1940, of legislation which, for the first time, gave to the Attorney General the authority, in defined circumstances, and in his discretion, to grant relief from the normal consequences of a finding that an alien was deportable. Two forms of relief were authorized. Subject to prescribed restrictions, the Attorney General was authorized (1) to permit an alien whom he found to be deportable to depart from the United States at his own expense in lieu of deportation (the so-called privilege of voluntary departure), or (2) to suspend the alien's deportation if

he found that deportation would result in serious economic detriment to a citizen or lawfully resident spouse, parent, or minor child of the alien (suspension of deportation).[8] With the introduction of this executive dispensing power into the immigration laws, the determination of deportability, which had in the past been the practical equivalent of an order of deportation (since it necessarily resulted in such an order), no longer had this automatic effect. In all cases involving an alien who was (or claimed to be) eligible for one of the authorized forms of discretionary relief and chose to apply for it during the deportation proceedings, the adjudication of deportability became, instead, merely the first step—an indispensable one to be sure—leading to the entry of such an order. Though *deportability* was determined, an *order of deportation* might never eventuate—depending upon the disposition made of the application for discretionary relief, including the resolution of any disputed eligibility issue.

This dispensing authority of the Attorney General—with amendments not here material—has remained a

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[8] Act of June 28, 1940, c. 439, § 20, 54 Stat. 671, amending Section 19 of the Immigration Act of 1917 by the addition of two new subsections, (c) and (d) (8 U.S.C. [1940 ed.] 155(c) and (d)). The operative provisions as to both forms of relief were contained in subsection (c); subsection (d) excepted certain enumerated classes of deportable persons from the latter subsection's provisions. If suspension of deportation was granted, the facts were required to be reported to Congress at the beginning of its next regular session. If, during that session, Congress, by concurrent resolution, disapproved the Attorney General's action, the alien was to be deported; otherwise the deportation proceedings—subject to certain further limitations if the alien's last entry had been illegal—were to be permanently canceled and the alien's status adjusted to that of a lawful resident. The substance of the two subsections, with amendments, is now contained in Section 244 of the 1952 Immigration and Nationality Act, as amended, 8 U.S.C. (1958 ed., Supp. IV) 1254 (Appendix A, *infra*, pp. 74-78).

fundamental part of the immigration laws to the present time. From the beginning, by regulations having the force and effect of law,[9] it has been exercised as an integral part of the administrative proceedings which have led to the issuance of a final deportation order; *i.e.*, it has been exercised by the delegate of the Attorney General who has had the authority to issue the order of deportation, and the officer's decision has been made in the proceedings which, if the relief sought was denied, culminated in the order. The consequence has been that, where the relief prayed for has been *granted*, there has been no deportation order—only an order granting voluntary departure or suspension of deportation, as the case might be.[10] It has never been the practice, in other words, *first* to hold a hearing on the issue of deportability—eventuating, where deportability was established, in a deportation order—and *thereafter* to entertain an application for discretionary relief from the order in a separate proceeding.[11] For this reason, an alien who has failed to make timely application for discretionary relief during the deportation proceedings, and who has subsequently manifested

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[9] See *Accardi* v. *Shaughnessy*, 347 U.S. 260, 265.

[10] Of course, as in this case (see *supra*, p. 5), an order granting voluntary departure may be combined with a *contingent* deportation order—directing that the alien be deported *if* he fails to depart within the time prescribed.

[11] For the pertinent regulations, see 8 C.F.R. (1943 Cum. Supp.) §§ 90.3(a)(1), 150.6(g) and (h), 150.7, 150.9; 8 C.F.R. (1949 ed.) §§ 90.3(a)(2), 90.9, 150.6(c), (g), and (h), 150.7, 150.9; 8 C.F.R. (rev. 1952) §§ 6.1(b)(2), 242.53(c), 242.54(d), 242.61(a), (c), (e), and (f), 244.1(b), 244.2, 244.12; 8 C.F.R. (rev. 1958) §§ 6.1(b)(2), 242.16(b), (c), and (e), 242.18, 242.20, 242.21(b), 244.1, 244.2, 244.12; 8 C.F.R. (rev. 1958, Cum. Pocket Supp. as of January 1, 1963) §§ 3.1(b)(2), 242.16(c), 242.17(a) and (b), 242.18(a) and (c), 242.20, 242.21, 244.1.

desire to seek such relief (after an order of deportation had been entered), has been required by the regulations to seek leave to have the proceedings reopened for that purpose.[12]

Further illustrative of the fundamental differentiation now made by the immigration laws between an adjudication of deportability (the first step) and an order of deportation (the final one) is the fact that Section 242 of the Act—the section specifically concerned with the procedure leading to, and the incidents and effects of, final orders of deportation—repeatedly distinguishes between the determination of deportability and the order of deportation, speaking at times in terms of the one and at times in terms of the other (Appendix A, *infra,* pp. 61-66). For example, Section 242(b)—which has particular pertinence here since Section 106(a), in describing the "final orders of deportation" intended to be encompassed therein, refers in terms to administrative proceedings "under section 242(b)"—provides that "A special inquiry officer shall conduct proceedings under this section to *determine the deportability* of any alien, * * * and, as authorized by the Attorney General, shall make determinations, *including orders of deportation*" (emphasis added).

In short, for more than twenty years prior to the enactment of Section 106(a), the term "final orders of deportation"—the subject matter and key phrase of that section—has had a meaning and significance, understood by those familiar with the deportation proc-

[12] 8 C.F.R. (1943 Cum. Supp.) § 150.8(b); 8 C.F.R. (1949 ed.) § 150.8; 8 C.F.R. (rev. 1952), § 6.2; 8 C.F.R. (rev. 1958) § 6.2; 8 C.F.R. (rev. 1958, Cum. Pocket Supp. as of January 1, 1963) §§ 3.2, 242.22.

ess, which has been carefully differentiated from the preliminary adjudication of deportability. For this reason we cannot agree with the majority that its construction, which for all practical purposes equates the order of deportation with the determination of deportability, is alone compatible with the natural sense of the terms used. We think, rather, that the phrase "final order of deportation" was intended to refer, as the words themselves fairly suggest, to the ultimate administrative decree—the culmination of the deportation process—that the alien be expelled from the country. Such a directive, as we have seen, is based upon, but does not necessarily result from, the adjudication of deportability.

B. Paragraph (4) of Section 106(a) is not inconsistent with the parties' construction

The principal provision of Section 106(a)—making the Hobbs Act applicable to the judicial review of all final orders of deportation—is followed by nine numbered paragraphs of exceptions (Appendix A, *infra*, pp. 58-61). One of these, paragraph (4), provides, with a subsidiary exception not here material, that

> the petition [for review] shall be determined solely upon the administrative record upon which the deportation order is based, and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive.

We agree that this provision applies only to the adjudication of deportability. Congress could not have intended it to apply to a discretionary determination, such as that on an application for suspension of deportation. For, as the majority observed (R. 20-21), the

Attorney General, in suspension proceedings, may in some circumstances find facts, and consequently exercise discretion, on the basis of information not in the administrative record; judicial review must accordingly take this possibility into account. *Jay* v. *Boyd*, 351 U.S. 345, 358. And, as the majority further noted (R. 21), since suspension of deportation "is a dispensing power, like a judge's power to suspend the execution of a sentence, or the President's to pardon a convict" (*United States ex rel. Kaloudis* v. *Shaughnessy*, 180 F. 2d 489, 491 (C.A. 2), quoted with approval in *Jay* v. *Boyd, supra*, 351 U.S. at 354, n. 16), the "reasonable, substantial, and probative evidence" standard of judicial review is manifestly inapplicable. Cf. *Jay* v. *Boyd, supra*, at 354; *Hintopoulos* v. *Shaughnessy*, 353 U.S. 72, 77.

The majority reasons that since paragraph (4) unquestionably applies only to adjudications of deportability, this must also be true of the principal provision of the section; in other words, that the "final orders of deportation" which form the subject matter of the principal provision must likewise be understood as limited to the adjudications of deportability (R. 20-22). The argument has some force; but it rests upon the assumed premise that the scope of each subdivision is coextensive with the principal enactment, and that is not necessarily true.

The fact that Congress, in one of several "exceptions" to the principal provision of Section 106(a), included a proviso which could only apply to determinations of deportability does not at all necessarily indicate that the principal provision was also intended to be thus limited. The adjudication of deportability is, after all, the principal—and indispensable—ingredient

of the ultimate product known as the final order of deportation. It would not be strange, therefore, for Congress to include in an overall enactment dealing with the judicial review of all final orders of deportation a specific provision pertinent to the principal constituent of such an order.

It should be observed, moreover, that paragraph (4) of Section 106(a), to the extent that it lays down a judicial standard of review of deportation orders (the provision that the Attorney General's findings of fact, if supported by "reasonable, substantial, and probative evidence," are to be conclusive), substantially duplicates the standard of review which had already been prescribed in prior legislation, *viz.*, Section 242 (b), eighth sentence, item (4) (Appendix A, *infra*, p. 63), (requiring that the regulations of the Attorney General include a requirement that "no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence"). Significantly, the standard of review as articulated in this prior provision was explicitly tied to the "decision of deportability." Had paragraph (4) of Section 106(a), with similar explicitness, referred to the "decision of deportability"—and all are agreed that this is precisely the paragraph's intent—the majority's argument based on that paragraph would obviously lose its point. For in that event it would be apparent that Congress, in paragraph (4), was merely emphasizing a fact having special pertinence to a particular aspect (the adjudication of deportability) of a broader subject (the judicial review of final orders of deportation). It is the government's view that this in fact was all that Congress intended to accomplish by paragraph (4), and that the inference which the majority drew

from the latter as to the intended scope of the principal provision of Section 106(a) is accordingly unwarranted.

II

THE CONGRESSIONAL INTENT THAT THE JUDICIAL REVIEW PROCEDURES ESTABLISHED BY SECTION 106(A) EXTEND TO ALL JUSTICIABLE ISSUES ARISING OUT OF A DEPORTATION PROCEEDING, INCLUDING DISCRETIONARY DETERMINATIONS AND ELIGIBILITY RULINGS MADE IN CONNECTION THEREWITH, IS CONFIRMED BY THE LEGISLATIVE HISTORY

A. The declared purpose of the legislation was to eliminate district court review of "all questions which may arise in a deportation proceeding"

The fundamental purpose of Section 106(a), its legislative history discloses, was to abbreviate the process of judicial review of deportation orders in order to frustrate certain practices, which had come to Congress's attention, whereby persons subject to deportation were forestalling enforcement by dilatory tactics in the courts. The chief feature of Congress's plan was the elimination of the previous first step in judicial review—a suit in the district court—and the consequent limitation of the review to the courts of appeals, subject only to the certiorari jurisdiction of this Court.

The objective of the new legislation, the House Committee on the Judiciary declared in reporting out the bill, was "to create a single, separate, statutory form of judicial review of administrative orders for the deportation * * * of aliens from the United States." H. Rep. 1086 on S. 2237, 87th Cong., 1st sess., p. 22. And see, to the same effect, the following reports accompanying predecessor bills (all identical, in relevant parts, with one another and with S. 2237): H. Rep. 2478 on H.R. 13311, 85th Cong., 2d sess., p. 2; H. Rep. 423 on H.R. 2807, 86th Cong., 1st sess., p. 1; H. Rep. 565

on H.R. 187, 87th Cong., 1st sess., p. 1. "The Committee on the Judiciary," the report went on to explain,

> has been disturbed in recent years to observe the growing frequency of judicial actions being instituted by undesirable aliens whose cases have no legal basis or merit, but which are brought solely for the purpose of preventing or delaying indefinitely their deportation from this country. * * *
>
> The alien whose sole immigration offense is, perhaps, a defect in his visa, or an over-extended stay as a visitor, usually accepts the order of deportation and departs. Other aliens, mostly subversives, gangsters, immoral, or narcotic peddlers, manage to protract their stay here indefinitely only because their ill-gotten gains permit them to procure the services of astute attorneys who know how to skillfully exploit the judicial process. Without any reflection upon the courts, it is undoubtedly now the fact that such tactics can prevent enforcement of the deportation provisions of the Immigration and Nationality Act by repetitive appeals to the busy and overworked courts with frivolous claims of impropriety in the deportation proceedings. * * *

H. Rep. 1086, *supra,* pp. 22-23. To the same effect see H. Rep. 2478, *supra,* pp. 2-3; H. Rep. 423, *supra,* p. 2; H. Rep. 565, *supra,* pp. 1-2.

In further elucidating the purpose of the proposed legislation on the floor of the House of Representatives, Congressman Walter, who, as chairman of Subcommittee No. 1 (immigration and nationality affairs among others) of the House Committee on the Judiciary, was the author and chief sponsor of the measure (see 107 Cong. Rec. 12177), said (104 Cong. Rec. 17172-17173):

Mr. Speaker, the purpose of this legislation is to provide a method of judicial review of deportation orders and to spell out the procedure so that aliens who are under deportation orders and who can afford it, cannot find access to the courts by some subterfuge or other, interminably. * * *

* * * * * * * * *

The proposed bill declares that all the provisions of the act of December 29, 1950, shall apply to and shall be the sole and exclusive procedure for the judicial review of orders of deportation of aliens within the United States. * * * Instead of the multitudinous and repetitive court reviews now available by virtue of judicial interpretations, the bill sets up a special single form of judicial review by the court of appeals. This will guarantee the person in question that by a review by an appellate court he will be getting justice to the fullest extent, and to the same extent as persons aggrieved by orders of other Federal agencies * * *. *Most important, by eliminating review in the district courts, the bill would obviate one of the primary causes of delay in the final determination of all questions which may arise in a deportation proceeding.* [Emphasis added.] [13]

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[13] Representative Walter's statement was made on August 12, 1958, in reference to H.R. 13311, 85th Cong., 2d sess., one of the predecessor bills. See also 105 Cong. Rec. 12724-12726, where Mr. Walter, on July 6, 1959, repeated the substance of his earlier statement, referring in this instance to H.R. 2807, 86th Cong., 1st sess. Cf. the observation of Assistant Attorney General Anderson, appearing as a witness on behalf of H.R. 13311, that the procedure prescribed by the bill "would avoid a great deal of delay by eliminating one step in the judicial review, that of the district court" (Hearing before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 85th Cong., 2d sess., on H.R. 13311, July 10, 1958, p. 23).

Since, from the beginning (see *supra*, pp. 18-20), applications for suspension of deportation and voluntary departure have been made and determined in and as integral parts of the deportation proceedings, "all questions which may arise in a deportation proceeding" would seem without question to include all justiciable issues arising out of the disposition of such applications, including rulings as to the applicants' eligibility for the relief sought. Cf. Mr. Walter's further statement on the floor of the House, referred to *infra*, p. 34, that "the 6 months' period on the question of finality of an order applies to the *final administrative adjudication of the applications for suspension of deportation just as it would apply to any other issue brought up in deportation proceedings*" (emphasis added). Thus, the above-quoted explanatory statement by the author and principal sponsor of the proposed legislation strongly corroborates the parties' interpretation of its intended scope.

B. The legislative history also contains evidence of a specific intent to give the courts of appeals exclusive jurisdiction to hear any legal challenge to denials of discretionary relief

1. The case histories of abuse summarized in the committee reports include references to litigation arising out of discretionary determinations

As examples of the evils which the proposed legislation was designed to correct, the committee reports accompanying the bills which eventuated as Section 106(a) contained a number of case histories, prepared by the Immigration and Naturalization Service, of proceedings in which, in the committee's and the Service's view, there had been abuse of the judicial process by dilatory or repetitive suits for review. Included among them were several in which the alien had sought,

inter alia, review of orders denying suspension of deportation.[14] When considered in conjunction with Congressman Walter's explanation of the purpose of the measure on the House floor (*supra,* pp. 25-26) and the similar explanations set forth in the committee reports (*supra,* pp. 24-25), these references to discretionary determinations and the litigation arising out of them are strongly corroborative evidence of Congress's intent to include issues having their origin in such discretionary rulings among the questions removed from the district courts under Section 106(a).

2. The "deportation • • • procedures" chart reproduced in the committee reports indicates that the denial of discretionary relief is an ingredient of the "final order of deportation"

Even more significant is a chart, entitled "Deportation Case Procedures", which is reproduced in two of the relevant committee reports (H. Rep. 423, 86th Cong., 1st sess., p. 20; H. Rep. 565, 87th Cong., 1st sess., p. 27). Each report explains that the chart, "outlining administrative procedures in deportation cases," was being printed "for reference purposes" (H. Rep. 423, p. 19; H. Rep. 565, p. 26). The chart illustrates, in diagrammatic form, the administrative steps leading to a "Final Order of Deportation." A central vertical line leads from a rectangular box at the top, captioned "Deportable Alien in United States," through other boxes labeled "Order to Show Cause" and "Hearing

[14] See, *e.g.*, the summaries as to the following aliens: *William Heikkila,* including the reference to *Jay* v. *Boyd,* 351 U.S. 345, a suspension case (H. Rep. 2478, 85th Cong., 2d sess., pp. 4, 14-15; H. Rep. 423, 86th Cong., 1st sess., pp. 3, 16-18; H. Rep. 565, 87th Cong., 1st sess., pp. 11, 20-23); *Hamish Scott MacKay* (H. Rep. 2478, pp. 15-16; H. Rep. 423, p. 18; H. Rep. 565, pp. 23-24); *Joseph Accardi* (H. Rep. 2478, pp. 16-17; H. Rep. 423, pp. 18-19; H. Rep. 565, pp. 24-25); *Leonard Costa* (H. Rep. 565, pp. 25-26).

by Special Inquiry Officer," to a bottom box bearing the legend "Final Order of Deportation." Extending horizontally to the left from the "Hearing by Special Inquiry Officer" box is a line leading to another box, which is divided into two segments, called "Voluntary Departure" and "Termination of Proceedings." Extending horizontally to the right from the "Hearing" box is a like line, leading to still another box, which is similarly divided into two parts, labeled "Deportation" and "Suspension of Deportation." Similar horizontal lines, extending to either side from the vertical line connecting the "Hearing" box to the "Final Order of Deportation" box, are linked to additional boxes denominated "Certification to Board of Immigration Appeals" and "Appeal of Decision to Board of Immigration Appeals."[15] For the Court's convenience the chart is reproduced in Appendix C, *infra*, p. 94.

Thus, according to the chart, the "Final Order of Deportation" is the final product which results from (1) the special inquiry officer's determination that the alien is deportable,[16] (2) the officer's denial of the privilege of voluntary departure or suspension of deportation where a request for one or the other of these forms of relief has been made, and (3) the failure by the Board of Immigration Appeals to disturb either of

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[15] The Board of Immigration Appeals may acquire jurisdiction in a deportation proceeding either through *appeal* by the alien or the Service's prosecuting officer from an adverse decision by the special inquiry officer, or by *certification* of the case by the Commissioner (or other authorized officer of the Service) or the Board itself. 8 C.F.R. (rev. 1958) §§ 6.1(b)(2) and (c), 242.20; 8 *id.* (Cum. Pocket Supp. as of January 1, 1963) §§ 3.1(b)(2) and (c), 242.20 (Appendix A, *infra*, pp. 79, 82).

[16] The box-segment marked with the single word "Deportation" manifestly refers to the adjudication of deportability.

these determinations in the event that the alien exercises his right of appeal to that body. The chart thus further substantiates and confirms the construction of Section 106(a) proposed by the parties.

3. The colloquy during the House debates between Representatives Walter, Lindsay, and Moore further indicates a purpose to make discretionary rulings reviewable under the new legislation

Further corrobative of the correctness of the parties' construction is a colloquy between Representatives Walter, Lindsay, and Moore, which occurred on July 6, 1959, during the House debates on H.R. 2807, 86th Cong., 1st sess.—one of the predecessor bills to S. 2237, 87th Cong., 1st sess., the measure by which Section 106(a) was enacted during the following Congress.[17] The colloquy is discussed in both opinions below (R. 19-20, 32-33, 34). We agree with the dissenting judges that the identity of the participants (see *infra*, pp. 30-31, 32, 34) gives the colloquy unusual importance in ascertaining the legislative intent.

One subdivision of H.R. 2807—which eventually appeared as Section 106(a)(1), 8 U.S.C. (1958 ed., Supp. IV) 1105a(a)(1) (Appendix A, *infra*, p. 58)—provided that the petition for review might be filed "not later than six months from the date of the final deportation order or from the effective date of this section, whichever is the later." The colloquy in question began with the following exchange between Congressman Walter and Representative Lindsay of New York (who, as noted by the dissenting judges, R. 33, was thoroughly familiar with the part played by discretionary determinations in the deportation process as a consequence of his having represented the government,

[17] The two bills were identical in relevant part.

three years earlier, in *Jay* v. *Boyd*, 351 U.S. 345, the now controlling case with respect to the review of orders of deportation involving denials of suspension of deportation) (105 Cong. Rec. 12728):

MR. LINDSAY: Mr. Speaker, will the gentleman yield?

MR. WALTER: I yield to the gentleman from New York.

MR. LINDSAY: One question on the subject of final orders of deportation and the 6 months' limitation on filing a petition for review following the final order of deportation: As the gentleman knows, the proposed bill provides that a petition for review may be filed not later than 6 months from the date of the final deportation order or from the date of this act, whichever is the later. Do I understand that that means that the 6-month period will not benefit the alien until the exhaustion of all the administrative remedies of whatever sort? Is that correct?

MR. WALTER: That is correct.

MR. LINDSAY: The gentleman knows that the immigration regulations are complicated and subject to change by the executive branch. The administrative review of orders of deportation sometimes can take different courses; so I would suggest that we make sure that the history of this is absolutely clear, that if there is any remedy on the administrative level left of any nature, that the deportation order will not be considered final.

MR. WALTER: That is correct. The final order means the final administrative order.

MR. LINDSAY: I thank the gentleman.

MR. MOORE: That is correct.

MR. LINDSAY: *Is it not true that the words "final deportation order" does not take effect until after determination of the question of suspension?*

MR. MOORE: *That is the manner in which I understand the meaning of the term as used in the pending bill.*

* * * * * * * * *

MR. WALTER: Mr. Speaker, during the course of the discussion the gentleman from New York raised the question of suspension of deportation. *I might say to the gentleman from New York that the 6 months' period on the question of finality of an order applies to the final administrative adjudication of the applications for suspension of deportation just as it would apply to any other issue brought up in deportation proceedings.* [Emphasis added.]

Having received this assurance, Mr. Lindsay made a brief speech advocating the enactment of the bill (105 Cong. Rec. 12728-12729), and it passed the House a few moments later (105 Cong. Rec. 12729).[20]

The weight of these expressions is great, indeed, when one considers the identity of the participants: Representative Walter, the author and chief proponent of the measure under discussion, and one of the congressional leaders in the whole area of immigration law; Representative Moore, co-sponsor of the bill, by whom it was reported out; and, "asking the important questions," Representative Lindsay, who, as noted above, was thoroughly conversant with the problems in this area. It was, moreover, as the dissent further

[20] The bill failed, however, to pass the Senate during that Congress. A successor bill was enacted into law during the following Congress (see *supra*, pp. 24-25).

observed (R. 33), only after repeated assurances were given that "The final order means the final administrative order," and that the " 'final deportation order' does not take effect until after determination of the question of suspension," with the ultimate statement by Mr. Walter himself that "the 6 months' period on the question of finality of an order applies to the final administrative adjudication of the applications for suspension of deportation just as it would apply to any other issue brought up in deportation proceedings," that the bill was passed.

It is true, to be sure, that the primary focus of attention during the colloquy was on the six-month limitations period and the point of time at which it would commence to run, rather than on the scope of review as such. Nevertheless we think it fair to conclude from the nature of the assurances which were given that all present understood, at the conclusion of the discussion and before the voting, that any issue which might arise out of the denial, during the deportation proceedings, of a request for discretionary relief would be as subject to review under the bill as the primary adjudication of deportability itself.[21]

III

THE SUBSIDIARY ARGUMENTS RELIED ON BY THE MAJORITY DO NOT WARRANT ITS CONCLUSION

We have already discussed the majority's principal reason for rejecting the parties' construction of Section 106(a), *viz.*, that, since it is beyond dispute that paragraph (4) of the "exceptions" to the principal

[21] Cf. Comment, *Deportation and Exclusion: A Continuing Dialogue between Congress and the Courts*, 71 Yale L. Journ. 760, 763-764, n. 20 (1962) (quoted in relevant part in footnote 7 of the dissent (R. 33)).

Under the regulations of the Attorney General in effect when Section 106(a) was enacted (September 26, 1961), the authority to designate the country of deportation was exercised by the local district directors. 8 C.F.R. (rev. 1958) § 243.1(b) (Appendix A, *infra*, p. 83). The district director did not make the designation until after the order of deportation had been entered and become final. 8 *id.* § 243.1(a) (Appendix A, *infra*, p. 83). Ordinarily, indeed, the designation was not made until some time after the issuance of the so-called "warrant" of deportation (the instrument by which an officer of the Service was authorized to take the alien into custody and physically deport him), and no administrative appeal lay from the district director's specification of the country to which the alien was to be sent. 8 *id.* §§ 243.1, 243.2, 243.3(a) (Appendix A, *infra*, pp. 83); see Gordon and Rosenfield, *Immigration Law and Procedure*, §§ 5.14, 5.17.

Since, under the regulations in effect when Section 106(a) was adopted, the designation of the country of deportation was not made until after the issuance of the warrant of deportation, at a time when the alien's physical removal from the country was imminent, a request by the alien for Section 243(h) relief—*i.e.*, that his deportation to the country designated be temporarily withheld on the ground that he would be subject to physical persecution if deported there at that time—was necessarily required to be made and determined in proceedings separate and distinct from the deportation proceedings, which had eventuated in the "final order of deportation." In other words, under the then-existing regulations, a motion for Section 243(h) relief assumed the existence of an outstanding final deportation order. Specifically, it was

required that an alien who claimed that he would be subjected to physical persecution in the country designated move the Service for a stay of his deportation for the purpose of presenting his Section 243(h) request. 8 *id.* § 243.3(b)(2) (Appendix A, *infra*, p. 84). He was required to appear before a special inquiry officer—not necessarily the officer who presided at the deportation hearing—for the presentation of his evidence and interrogation under oath. The special inquiry officer then prepared a memorandum of his findings and a recommendation as to the proper disposition of the motion. These were sent to the local regional commissioner, who had the final decision—from which no administrative appeal lay—as to whether deportation should be withheld and, if so, for what period of time. 8 *id.* § 243.3(b)(2) and (3) (Appendix A, *infra*, pp. 84-85).

Subsequent to the enactment of Section 106(a), the regulations governing both the procedure for designating the country of deportation and the manner of processing a Section 243(h) motion were substantially and relevantly revised. Under the new regulations, which were published December 19, 1961, and took effect on January 22, 1962 (26 F.R. 12114), both the designation of the country of deportation and the determination of any Section 243(h) request for relief which the alien might wish to make are effected in the deportation proceedings and reflected in the final order of deportation. Specifically, under the regulations now in force, the special inquiry officer who presides at the deportation proceedings notifies the alien during the proceedings that, *if* he should be finally ordered deported, his deportation will in the first instance be directed, pursuant to Section 243(a), to any country

A moment later Representative Moore, the member of the Judiciary Committee who reported out the bill under consideration,[18] said (*ibid.*):

> Opponents of this legislation raise one point which deserves further explanation.
>
> They claim that in some cases aliens may be induced to file court proceedings for review of their deportation order even though they may qualify for administrative or legislative relief. Let me give an example. Under section 244 of the present Immigration and Nationality Act (8 U.S.C., sec. 1254) an alien against whom a final order of deportation is issued may under certain conditions have his deportation suspended and his status adjusted to that of an alien admitted for permanent residence. Ordinarily a request for suspension of deportation under this section is not made until after the determination that the alien is deportable. However, since there is no provision for tolling the 6-month period of review under the bill because of such post-deportation proceedings, it is claimed that the alien may feel compelled to file his case in court even though he has a basis for administrative relief. And once a case is filed in court, the Immigration Service may be precluded from concurrently considering a request for administrative relief because of the exclusive jurisdiction of the court over the case.
>
> These circumstances are admittedly undesirable. However, they are not irreparable. The alien does not forfeit any avenues of administrative relief, but at most, simply has to postpone their enforcement. I have concluded that the real remedy for this situation is to be sought in a change in the present administrative practice of considering the issues of deportability and suspension of deporta-

[18] H. Rep. 423, 86th Cong., 1st sess.

tion piecemeal. There is no reason why the Immigration Service could not change its regulations to permit contemporaneous court consideration of deportability and administrative application for relief. That would remove this objection entirely. I am hopeful that this matter will be given further study by the committee in the near future."[19]

The following then occurred (*ibid.*):

MR. LINDSAY: Mr. Speaker, will the gentleman yield?

MR. MOORE: I yield to the gentleman from New York.

MR. LINDSAY: A moment ago I asked the gentleman from Pennsylvania [Mr. Walter] whether or not it was correct to say that the 6 months period would not begin to run until after the exhaustion of all administrative remedies. In my question I assumed that suspension of deportation would be included as an administrative remedy. In other words, the question of deportability would be decided one way or the other. Assuming the alien was found to be deportable, then he goes back for further administrative relief. He asks for suspension of deportation proceedings. It may take a while before there is a determination on that question.

[19] Mr. Moore was mistaken in his apparent assumption that under the existing regulations the alien had no opportunity to apply for suspension of deportation, and the administrative authorities gave no consideration to such an application, until after the entry of a final order of deportation. As we have previously pointed out (*supra*, pp. 18-20), the regulations have required from the beginning that the alien file his application for discretionary relief during the deportation proceedings, prior to the issuance of a deportation order. The "issues of deportability and suspension of deportation," in other words, were *not* considered "piecemeal," as Mr. Moore thought, but, on the contrary, were considered in the same proceeding and prior to the issuance of a final order of deportation.

provision of that section applies only to the determination of deportability, the principal clause of the section should likewise be deemed limited to the deportability adjudication (*supra*, pp. 21-24). The subsidiary arguments pressed by the majority opinion are also unpersuasive.

A. It is not "in the last degree unlikely" that Congress meant to require that discretionary determinations be initially reviewed by a court of three judges

One of the difficulties which the majority found with the parties' construction of Section 106(a) was its conviction that (R. 12)—

> especially [22] since the general command of the Administrative Procedure Act as to judicial review, 5 U.S.C. § 1009, excepts action which "is by law committed to agency discretion," it would seem in the last degree unlikely that Congress meant to require that a decision resting in executive grace, as to which the scope of any review is so narrow, must be initially reviewed by a court of three judges * * *.

This criticism is, in our view, unsound for several reasons.

1. First, while Section 10 of the Administrative Procedure Act, 5 U.S.C. 1009, excepts from judicial review agency action which "is by law committed to agency discretion," this exception is qualified by the subsequent provision of the same section, § 10(e), 5 U.S.C. 1009(e), that the reviewing court "shall * * * hold

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[22] The word "especially" was added to the opinion subsequent to its original filing, and does not appear in the copy contained in the printed record. The emendation is reflected in the opinion as reported at 308 F. 2d 779 (see p. 782).

unlawful and set aside agency action * * * found to be (1) arbitrary, capricious, [or] an abuse of discretion * * *." In other words, agency action which by law is committed to agency discretion is exempt from judicial review *except* where discretion has been abused—in which case the court is empowered and directed to set the action aside. One who claims that discretionary authority has been exercised in so arbitrary a manner as to require judicial intervention obviously bears a severe burden of proof. But where abuse has occurred and can be established by a sufficient showing, the duty to set aside the offending action is manifestly a judicial function of the highest seriousness. There is no reason for assuming, therefore, that Congress, in enacting Section 106(a), could not have intended that it be discharged in the first instance by a court of three judges.

2. Secondly, not all challenges of denials of applications for discretionary relief from deportation consist merely of claims of abuse of discretion, as the majority's present point appears to assume. Much of the litigation in the area of discretionary determinations, and perhaps the greater part, involves disputed issues relating to the alien's statutory eligibility for the relief sought. (Cf. this case (*supra*, pp. 4, 6).) In such cases the question of the propriety of an executive exercise of discretion is not involved, since discretion has not in fact been exercised. An eligibility issue, moreover, may well involve, and often does involve, a pure question of statutory construction—the type of issue which is within the special competence of a court of appeals.

3. Thirdly, and most important, this criticism fails, we submit, to give adequate recognition to the funda-

mental purpose of Section 106(a), as disclosed by its legislative history. That objective, as we have pointed out (*supra*, pp. 24-27), was to shorten the procedure for the review of deportation orders by eliminating the district court stage—the normal first step in the review process. This was part of a carefully planned effort by Congress to thwart the designs of aliens under outstanding deportation orders who, desirous of forestalling their deportation for as long a time as possible, seek to achieve their objective through resort to dilatory review tactics. Under the decision below, an alien under an order of deportation who had applied for and been denied a form of discretionary relief from deportation, and who chose to seek judicial review of the discretionary determination, would be required to file his suit in the first instance in a district court—with, of course, the right to appeal from an adverse determination to the court of appeals. Certainly, this right would be exercised by the class of deportees who were the principal source of congressional concern—those intent upon delay. In such cases, the court of appeals would not escape the need to decide ultimately the issue of the propriety of the discretionary ruling; the issue would simply come before it at a later time, and in a slightly different procedural context—"by appeal from the district court" instead of "by way of petition for agency review," as the dissent below noted (R. 32). In the meantime the alien would have succeeded in prolonging his stay in this country by an interval equal to the time during which his case was pending in the district court—in direct frustration of the basic objective of Section 106(a). Thus, far from being "in the last degree unlikely" that Congress meant to require discretionary determinations to be initially reviewed by

the courts of appeals, as the majority thought, the declared purpose of the section would be in substantial measure defeated if such determinations were to continue, as in the past, to be reviewed by the district courts.

B. It is not "incredible" that Congress meant to burden courts of appeals with review of orders denying the privilege of voluntary departure

A second difficulty which the majority found with the parties' construction was that it seemed (R. 18)—

> hard to sustain that an order of a special inquiry officer denying suspension comes within § 106(a) whereas one made in the same proceeding denying voluntary departure is not; yet it is quite incredible that Congress meant to burden courts of appeals with review of orders of the latter sort * * *.

We cannot agree, however, with the majority's assumption that it is "quite incredible" that Congress intended that the courts of appeals should have jurisdiction under Section 106(a) to review orders denying voluntary departure. On the contrary, we submit, when the primary objective of the section is kept in mind—*viz.*, the frustration of efforts to forestall the carrying out of deportation orders through resort to dilatory review tactics—there is compelling basis for concluding that Congress intended denials of voluntary departure to be quite as subject to court of appeals review as denials of suspension, and for the same reasons. For otherwise there would be nothing to prevent an alien bent on delay from first seeking review of such an order in a district court—the majority does not question, and indeed it is undisputed, that he may seek review of it in some court—and then proceeding

by way of appeal (if he loses in the district court) to litigate the same issue in the court of appeals. Meanwhile he would have achieved the very purpose—delay—which Section 106(a) was designed to prevent so far as possible.

C. The parties' construction satisfactorily answers certain closely related questions as to the scope of Section 106(a)

A third difficulty which the majority found with the parties' construction was that it fails to provide satisfactory solutions to certain closely related questions as to the reach of Section 106(a), in particular whether the section extends to denials of "withholding" of deportation under Section 243(h) of the Act, 8 U.S.C. 1253(h) (Appendix A, *infra*, p. 68), and to the denial of a motion to reopen a deportation proceeding after a deportation order has been entered and become final (R. 17-18). Since the instant case does not involve a denial of either of the latter types, it is not necessary, strictly speaking, for the Court to consider issues pertaining to them at this time. We recognize, nevertheless, that the question of the applicability of Section 106(a) to such related types of orders has at least peripheral relevance to the issue directly presented, and is one, moreover, on which the lower courts are sharply divided. We accordingly shall attempt to show that the parties' construction does provide a solution to these cognate questions, and that the majority's criticism of it on this score is consequently unsound.

1. Denials of withholding of deportation under Section 243(h):

Before presenting the majority's specific criticism based on Section 243(h), and our reply to it, it is necessary, in order that the point of the supposed difficulty

be properly assessed, to relate briefly the nature of the relief authorized by Section 243(h), and the procedures, past and present, whereby applications for such relief have been heard and determined.

Section 243(a) of the Immigration and Nationality Act, 8 U.S.C. 1253(a) (Appendix A, *infra*, pp. 66-68), prescribes rules for the guidance of the Attorney General in designating the country to which an alien found to be deportable is to be expelled. Subject to qualifications and limitations which need not be detailed, deportation is to be (1) to the country of the alien's choice if that country will receive him; or (2) if the alien makes no designation, or the country he selects is unwilling to receive him, then to the country of which he is a citizen or subject if it will accept him; or (3), if that country is unwilling to take him, then, in the Attorney General's discretion, to any one of seven other specified categories of countries—such as the country from which the alien last entered the United States, the country of his birth, etc. In recognition, however, of the fact that the political situation in the country designated by the Attorney General pursuant to the statutory scheme might be such that the alien would be subjected to physical persecution if deported there at the time of entry of the order of deportation, Congress has, in Section 243(h), authorized the Attorney General to

> withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason.

which the alien designates and which is willing to receive him, and the alien is given the opportunity then and there to make such designation. 8 C.F.R. (rev. 1958, Cum. Pocket Supp. as of January 1, 1963) § 242.17(c) (Appendix A, *infra*, pp. 86-87). The special inquiry officer then specifies and states for the record the country (or countries in the alternative) to which the alien's deportation will be directed if the country which the alien designates declines to receive him or the alien elects not to make a designation. The officer further advises the alien that he may apply, pursuant to Section 243(h), for temporary withholding of his deportation to the country or countries specified by the officer, and the alien is allowed a period of not more than ten days in which to submit an application for such relief. If he submits such a request, the officer hears and determines it in the deportation proceedings—*before the issuance of any order.*" *Ibid.*

At the conclusion of the proceedings, the special inquiry officer enters his order, directing "the respondent's deportation, or the termination of the proceedings, or such other disposition of the case as may be appropriate." 8 *id.* § 242.18(c) (Appendix A, *infra*, p. 88). If deportation is directed, the order is required to specify the country, or countries in the alternative, to which the alien is to be sent. *Ibid.* The decision must contain a discussion of the evidence pertaining to any application made by the alien during the proceedings and the officer's reasons for granting or denying

[22] Though the regulations are not specific on the point, the officer presumably conducts the hearing on the Section 243(h) application only after he has satisfied himself that the alien is deportable and that, if an application for suspension of deportation has been made, the alien is either ineligible for such relief or should be denied it as a matter of discretion.

the request. 8 *id.* § 242.18(a) (Appendix A, *infra*, p. 87). Presumably, though the regulations are not specific on the point, if the officer determines that the alien's deportation to the country named in the order should be temporarily withheld as authorized by Section 243(h), the order is to specify the period during which such withholding is to be effective—either in specific terms or until further notice.[24] The order of the special inquiry officer is declared by the regulations to be "final" unless the case is appealed or certified to the Board of Immigration Appeals. 8 *id.* §§ 242.20, 242.21 (Appendix A, *infra*, p. 88).[25] No other procedure for submitting and determining a request for relief under Section 243(h) is permitted. 8 *id.* § 242.17(d) (Appendix A, *infra*, p. 87).[26]

Thus, whereas under the former regulations the country of deportation was designated and an application for Section 243(h) relief was determined in pro-

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[24] Cf. the provision of the prior regulations (8 C.F.R. [rev. 1958] § 243.3(b)(2) (Appendix A, *infra*, pp. 84-85)) requiring the regional commissioner, if his decision was to withhold deportation, to state "for what period of time" it was withheld (see *supra*, p. 43).

[25] A decision of the special inquiry officer may be appealed to the Board by the alien or the Service's prosecuting officer, or "certified" to that body by the Commissioner or other duly authorized officer of the Service, or by the Board itself. 8 *id.* §§ 3.1(b)(2) and (c), 242.20 (Appendix A, *infra*, pp. 79, 88). The decision of the Board is final except where review by the Attorney General is ordered. 8 *id.* § 3.1(d)(2) (Appendix A, *infra*, p. 79). A case is reviewed by the Attorney General if the Attorney General so directs, the chairman or a majority of the Board believes that it should be, or the Commissioner so requests. 8 *id.* § 3.1(h)(1) (Appendix A, *infra*, p. 79).

[26] The regulations specifically forbid construing of a request for Section 243(h) relief, or any other request for discretionary relief from deportation, as a concession either of alienage or of deportability. *Ibid.*

ceedings distinct from and postdating the deportation proceedings, and those functions were performed by officials other than the special inquiry officer who conducted the deportation proceedings and issued the final order of deportation, both functions are now performed in and as part of the deportation proceedings, and by the same officer who enters the final deportation order. And whereas formerly the deportation order simply directed that the alien "be deported," 8 C.F.R. (rev. 1958) § 242.18 (Appendix A, *infra*, p. 82), the order now specifies the country to which the alien is to be sent, and indicates, where there has been a request for temporary withholding under Section 243(h), whether the request has been granted or denied, and, if granted, for what period.

With the foregoing explanation of past and present procedures for processing a Section 243(h) application by way of background, we now turn to the majority's criticism of the parties' construction on the ground that it provides no satisfactory solution to the question whether Section 106(a) applies to denials of such applications as well as to denials of suspension of deportation. The majority said (R. 17-18):

> On the view taken by the Service here, was jurisdiction conferred on the courts of appeals only as to denials of suspension under § 244(a) or also as to withholding under § 243(h)? As the regulations stood when Congress acted, it would be hard to sustain the latter under the Service's theory, since the determination was made, not by the special inquiry officer who alone is named in § 242(b) but by the regional commissioner; yet the situations are so much alike that a construction including one and excluding the other would scarcely be rational. Since then the regulations have been

> amended, 26 F.R. 12113 (Dec. 19, 1961), so that the special inquiry officer-Board of Immigration Appeals procedure prevails also under § 243(h). We do not question the power of the Attorney General thus to alter the procedure under § 243(h), but it would be rather novel that an administrative regulation could bring something within the jurisdiction of the courts of appeals which was not covered by the language that Congress used and which, having given today, the Attorney General can take away tomorrow, as, indeed, he can do under § 244. . . .

The majority's criticism is based, the government submits, on two untenable assumptions.

a. First, we disagree with the majority that, *under the regulations in effect when Section 106(a) was enacted,* the denial of suspension of deportation under Section 244(a) and the denial of withholding of deportation under Section 243(h) were "so much alike that a construction [of Section 106(a)] including one and excluding the other would scarcely be rational." On the contrary, we think that precisely such a distinction must be made. It is the government's view, in other words, that under the regulations formerly in effect Section 106(a) did not extend to denials of Section 243(h) relief, whereas it did extend (for the reasons we have previously outlined, see *supra,* pp. 13-35) to denials of suspension.[27]

Our conclusion that Section 106(a) did not originally extend to Section 243(h) denials has been reached with considerable reluctance, since the *spirit* of Section 106(a), particularly as illumined by its legislative his-

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[27] We believe that under the *current* regulations Section 106(a) does extend to Section 243(h) denials (see *infra,* pp. 49-51).

tory (see *supra*, pp. 24-35), suggests that it may well have been the wish of Congress to remove all issues having any connection whatever with the deportation of aliens from the district courts and place them in the courts of appeals. We are confronted, nevertheless, by the fact that, if that indeed was what Congress intended, the language it employed was, in this particular respect, inadequate. Section 106(a) limits the grant of authority therein contained to the judicial review of "all final orders of deportation * * * made * * * pursuant to administrative proceedings under Section 242(b) * * *." Concededly, if these words are to be followed faithfully, it is difficult to see how the section can be construed to extend to a determination made *subsequent to* the final deportation order, in proceedings *distinct from* the administrative proceedings under Section 242(b), by an official *other than* the special inquiry officer who presided over the deportation proceedings and issued the order of deportation.[28] But,

[28] The decisions are in conflict as to whether, under the regulations as they formerly read, the denial of Section 243(h) relief was within the scope of Section 106(a). The Seventh Circuit has held that it was, *Blagaic* v. *Flagg*, 304 F. 2d 623, while the Ninth Circuit, *Holz* v. *Immigration and Naturalization Service*, 309 F. 2d 452, and the District Court for the Southern District of New York, *Zupicich* v. *Esperdy*, 207 F. Supp. 574, have held that it was not. The Seventh Circuit reasoned that the question whether to grant or deny such relief "involves the execution or suspension of the deportation order"; that the question is "therefore * * * ancillary to the order;" that "[i]f the withholding of deportation is not granted, [the alien] will be deported"; and that "thus, in a realistic sense the denial of [withholding] is a part of the deportation order" (304 F. 2d at 625). (Cf. *Roumeliotis* v. *Immigration and Naturalization Service*, 304 F. 2d 453, 454-455, certiorari denied, 371 U.S. 921, where the same court used similar reasoning in holding Section 106(a) to be applicable to the administrative denial, subsequent to the issuance of a final order of deportation, of a first preference visa.) Under the Seventh Circuit's approach,

granting that Congress may have failed initially to adopt language adequate to assure the achievement of its basic purpose in every situation within its broad contemplation, it surely does not follow that the answer is to deny implementation of the statute in the many other instances in which no such obstacle is encountered.

b. We submit furthermore—and this brings us to what we believe is the second untenable assumption in the majority's criticism quoted *supra*, pp. 46-47—that, *under the regulations now in force* (*supra*, pp. 43-46), the denial of Section 243(h) relief *is* subject to review under Section 106(a). Cf. *Lam Man Chi* v. *Bouchard*, 314 F. 2d 664, 674, n. 21 (C.A. 3) (involving the applicability of Section 106(a) to the designation of the country of deportation; see fn. 30, *infra*, p. 50). We take this position because, under the present practice, unlike the situation formerly prevailing, a Section 243(h) denial is made in the deportation proceedings, by the officer who conducts those proceedings and issues the final order of deportation, and is reflected in the order (see *supra*, pp. 42-46).[29] In other words, under

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it would appear that any action of any immigration official which can in some sense be said to be "ancillary" to a deportation order, and which is of such a character that, had the decision gone the other way, the alien's deportation would as a practical matter not be carried out, or at least would be temporarily or indefinitely postponed, may be treated as though it were "part of" the deportation order (though in fact it was not), and hence as within the purview of Section 106(a). While the simplicity of this approach is not without appeal, we have been compelled to conclude, for the reasons stated in the text, that it cannot be sustained in the light of the actual language which Congress used in Section 106(a).

[29] There are no decisions to our knowledge involving the applicability of Section 106(a) to the denial of Section 243(h) relief under the present regulations.

the regulations currently in effect, the denial of Section 243(h) relief is an integral part of the "final order of deportation" to which Section 106(a) in terms refers.[35]

The majority assumed (*supra*, pp. 46-47) that it may not legitimately be concluded, as we suggest, that denials of Section 243(h) relief are now within the coverage of Section 106(a) whereas before the 1961-1962 change in the regulations they were not—because if that were so, the majority thought, it would mean that the Attorney General has the power, simply by changing his regulations, to expand the scope of the subject-matter jurisdiction which Congress has vested in the courts of appeals by statute. We cannot agree, however, with the majority's reasoning on this point. There is a sense, it is true, in which it can be said that the change of regulations, if it had the effect we have attributed to it, enlarged the courts of appeals' powers under Section 106(a). More properly viewed, however, the jurisdiction of the courts of appeals under Section 106(a) is limited now, as it was when Congress acted, to the review of all "final orders of deportation * * *." The

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[35] We note parenthetically that we take the same position, and for the same reasons, with respect to the designation of the country of deportation. We think that, prior to the 1961-1962 change in regulations, *supra*, pp. 43-45, *i.e.*, when the country of deportation was still designated by the district director after the deportation order had been entered and become final (*supra*, p. 42), the specification of the place of deportation did not come within the scope of Section 106(a)—as the only two circuits which have expressly ruled on the point, the Third and the Ninth, have held. See *Lam Man Chi* v. *Bouchard*, 314 F. 2d 664 (C.A. 3); *Mai Kai Fong* v. *Immigation and Naturalization Service*, 305 F. 2d, 239, 242 (C.A. 9). On the other hand, we believe that under the regulations presently in effect the specification of the country of deportation is reviewable under Section 106(a), since it is now a part of the final deportation order (*supra*, pp. 43-46)—as the Third Circuit, in a *dictum* in the *Lam Man Chi* case, *supra*, indicated it also thought (314 F. 2d at 674, n. 21).

change in regulations, by which the procedures whereby Section 243(h) applications are processed were altered (a change which the majority had no doubt the Attorney General had power to make, see *supra*, p. 47), had the incidental effect of expanding the decisional content of such orders; they now reflect, whereas previously they did not, the administrative disposition of such applications. But in no substantial or legally tenable sense can it be said, we submit, that under the government's interpretation of the effect of the change in regulations the powers of the courts of appeals were augmented. Surely, there is nothing novel in the conclusion that changes in administrative procedures may affect the scope and content of particular types of agency orders and hence the subject matter embraced in a proceeding to review these orders.

2. Refusals to reopen deportation proceedings:

In further criticism of the parties' construction the court below said (R. 18):

> Then there is the case where the grievance is the refusal to reopen a deportation proceeding to permit an application for suspension to be filed * * *. Is such an order also a "final order of deportation"?

Under the court's construction of Section 106(a), such an order would of course not come within the section's purview, and the evident point of the court's comment was that the parties' interpretation is unacceptable because it is incapable of giving a satisfactory answer to the question the court posed.

Before we address ourselves to the merits of the court's hypothetical question, two preliminary observations should be made. First, the question put by the court is the specific issue presented in *Giova* v.

Rosenberg, 308 F. 2d 347 (C.A. 9), pending on petition for certiorari (acquiesced in by the government), No. 15 Misc., Oct. Term, 1963 (No. 898 Misc., Oct. Term, 1962).[21] Discussion of the question at this time, accordingly, may be of assistance to the Court in determining the proper disposition of that petition as well as in resolving the tangentially related issue presented in the instant case. Second, although the court below characterized the "refusal to reopen" of which it spoke as a refusal to reopen "to permit an application for suspension to be filed," the question would be no different, as the government sees it, if the motion to reopen had a different purpose—as, for example, the presentation of new evidence on the issue of deportability. In other words, the problem of the applicability *vel non* of Section 106(a) to an order denying a motion to reopen is the same, regardless of what the reason for the request may have been.

On the merits, it must be conceded that the question posed by the majority is a close one under the construction of Section 106(a) which the government has advocated. *Literally*, an order denying a motion to reopen is not a "final order of deportation." The order of deportation, by hypothesis, was previously entered and permitted to become final—either through failure to appeal to the Board of Immigration Appeals or by the Board's failure to disturb the order. It is plain, therefore, that if Section 106(a) is to be con-

[21] The Ninth Circuit held in the *Giova* case that a refusal to reopen a deportation proceeding is outside the scope of Section 106(a)—a position to which it has subsequently adhered in *Gallegos* v. *Immigration and Naturalization Service*, 310 F. 2d 688, and *Murillo-Aguilera* v. *Immigration and Naturalization Service*, 313 F. 2d 141.

strued with absolutely literal strictness, a refusal to reopen the proceedings is beyond its scope—as the court of appeals in the *Giova* case held.

We believe, nevertheless, that such an order should be deemed to come under Section 106(a). The principal reasons which persuaded us that orders designating the country of deportation and orders denying relief under Section 243(h) were not within the coverage of Section 106(a) prior to the change in regulations under which such orders are now made in the deportation proceedings (see *supra*, pp. 47-48; fn. 30, p. 50) do not apply to an order denying a motion to reopen. It is true that a refusal to reopen, like the designation of the country of deportation and the refusal to grant Section 243(h) relief under the prior practice, occurs subsequent to the final order of deportation. But, unlike those orders, an order denying a motion to reopen is made by the same officer who entered the final order of deportation—or, if the order was appealed to the Board of Immigration Appeals, then by that body, which, by its decision dismissing the appeal, in effect endorsed the deportation order and assumed responsibility for it—and is so directly linked with the deportation proceedings out of which the deportation order arose that it would, in the government's view, be *artificially* literal to attempt to distinguish between them. In other words, an order refusing to reopen the proceedings is so intimately and immediately associated with the principal order (the final order of deportation) that it would be pointlessly literal, and contrary to the sound administration of the immigation laws, to require that the subsidiary order be treated otherwise then as an adjunct of the principal order—comparable to the denial

of a motion for rehearing or reconsideration. So considered, it should be reviewable, in the government's opinion, in the same forum in which the principal order would have been reviewed if review of the latter had been sought.[22]

It bears repeating, however, that the problem of the applicability of Section 106(a) to refusals to reopen has but peripheral relevance to the issue posed in *this* case. Whatever may be the answer to the majority's hypothetical question, therefore, the justiciable issues arising from a refusal to grant a request for suspension of deportation should be held reviewable in the courts of appeals under Section 106(a). For such an order, as we have seen, has always been deemed a component part of the final deportation order, and was quite unmistakably intended by Congress to be within the coverage of that section. If Congress did fail to achieve all of its purposes, the statute must nonetheless be ungrudgingly applied to the full extent that its language fairly permits. This precept fully encompasses cases of the kind at bar.

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[22] Of course, if the alien sought review of *both* the final order of deportation *and* the order refusing to reopen the proceedings, the court of appeals would without question, in the government's view, have complete jurisdiction of the entire controversy—under the "pendent jurisdiction" principle. See fn. 5, *supra*, p. 7. Cf. *Dentico* v. *Immigration and Naturalization Service*, 303 F. 2d 137 (C. A. 2).

CONCLUSION

For the foregoing reasons the government respectfully submits, with petitioner, that the judgment of the court of appeals should be reversed and that the cause should be remanded to that court with directions to entertain the petition for review.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

PHILIP R. MONAHAN,
Attorney.

JULY 1963.

APPENDIX A

STATUTES AND REGULATIONS INVOLVED

I. Statutes

1. Section 106 of the Immigration and Nationality Act, as added by Section 5(a) of Public Law 87-301, approved September 26, 1961, 75 Stat. 651 [33] (8 U.S.C. [1958 ed., Supp. IV] 1105a), provides:

JUDICIAL REVIEW OF ORDERS OF DEPORTATION AND EXCLUSION

Sec. 106. (a) The procedure prescribed by, and all the provisions of the Act of December 29, 1950, as amended (64 Stat. 1129; 68 Stat. 961; 5 U.S.C. 1031 et seq.),[34] shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or

[33] Section 5(b) of Public Law 87-301 (75 Stat. 653) provided that the newly enacted section was to take effect on the thirtieth day after its approval—*i.e.*, on October 26, 1961—and that, irrespective of the provisions of any other law, including Section 405 of the Immigration and Nationality Act (the saving clause of that Act, 8 U.S.C. 1101, Note), the new section was to be applicable to all administrative proceedings involving the deportation or exclusion of aliens, notwithstanding (1) that the person involved may have entered the United States prior to the effective date of the new section or of the Immigration and Nationality Act, or (2) that the administrative proceeding may have been commenced or conducted prior to the effective date of the new section or of that Act. It was further provided that any judicial proceeding to review an order of deportation which was pending unheard in any district court on the effective date of the new section (with certain exceptions) was to be transferred for determination to the court of appeals having jurisdiction to review the order under the new section.

[34] The Act of December 29, 1950 (the "Hobbs" Act), as amended, provides that the courts of appeals "shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of, all final orders" of certain designated federal agencies in proceedings under designated statutes (§ 2, as amended, 5 U.S.C. 1032).

hereafter made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this Act or comparable provisions of any prior Act, except that—

(1) a petition for review may be filed not later than six months from the date of the final deportation order or from the effective date of this section, whichever is the later.

(2) the venue of any petition for review under this section shall be in the judicial circuit in which the administrative proceedings before a special inquiry officer were conducted in whole or in part, or in the judicial circuit wherein is the residence, as defined in this Act, of the petitioner, but not in more than one circuit;

(3) the action shall be brought against the Immigration and Naturalization Service, as respondent. Service of the petition to review shall be made upon the Attorney General of the United States and upon the official of the Immigration and Naturalization Service in charge of the Service district in which the office of the clerk of the court is located. The service of the petition for review upon such official of the Service shall stay the deportation of the alien pending determination of the petition by the court, unless the court otherwise directs;

(4) except as provided in clause (B) of paragraph (5) of this subsection, the petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive;

(5) whenever any petitioner, who seeks review of an order under this section, claims to be a national of the United States and makes a showing that his claim is not frivolous, the court shall (A) pass upon the issues presented when it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or (B) where a genuine issue of material fact as to the petitioner's nationality is presented, transfer the proceedings to a United States district court for the district where the petitioner has his residence for hearing de novo of the nationality claim and determination as if such proceedings were originally initiated in the district court under the provisions of section 2201 of title 28, United States Code. Any such petitioner shall not be entitled to have such issue determined under section 360(a) of this Act or otherwise;

(6) if the validity of a deportation order has not been judicially determined, its validity may be challenged in a criminal proceeding against the alien for violation of subsection (d) or (e) of section 242 of this Act only by separate motion for judicial review before trial. Such motion shall be determined by the court without a jury and before the trial of the general issue. Whenever a claim to United States nationality is made in such motion, and in the opinion of the court, a genuine issue of material fact as to the alien's nationality is presented, the court shall accord him a hearing de novo on the nationality claim and determine that issue as if proceedings had been initiated under the provisions of section 2201 of title 28, United States Code. Any such alien shall not be entitled to

have such issue determined under section 360(a) of this Act or otherwise. If no such hearing de novo as to nationality is conducted, the determination shall be made solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial and probative evidence on the record considered as a whole, shall be conclusive. If the deportation order is held invalid, the court shall dismiss the indictment and the United States shall have the right to appeal to the court of appeals within thirty days. The procedure on such appeals shall be as provided in the Federal rules of criminal procedure. No petition for review under this section may be filed by any alien during the pendency of a criminal proceeding against such alien for violation subsection (d) or (e) of section 242 of this Act;

(7) nothing in this section shall be construed to require the Attorney General to defer deportation of an alien after the issuance of a deportation order because of the right of judicial review of the order granted by this section, or to relieve any alien from compliance with subsections (d) and (e) of section 242 of this Act. Nothing contained in this section shall be construed to preclude the Attorney General from detaining or continuing to detain an alien or from taking him into custody pursuant to subsection (c) of section 242 of this Act at any time after the issuance of a deportation order;

(8) it shall not be necessary to print the record or any part thereof, or the briefs, and the court shall review the proceedings on a typewritten record and on typewritten briefs; and

(9) any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.

(b) Notwithstanding the provisions of any other law, any alien against whom a final order of exclusion has been made heretofore or hereafter under the provisions of section 236 of this Act or comparable provisions of any prior Act may obtain judicial review of such order by habeas corpus proceedings and not otherwise.

(c) An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order. Every petition for review or for habeas corpus shall state whether the validity of the order has been upheld in any prior judicial proceeding, and, if so, the nature and date thereof, and the court in which such proceeding took place. No petition for review or for habeas corpus shall be entertained if the validity of the order has been previously determined in any civil or criminal proceeding, unless the petition presents grounds which the court finds could not have been presented in such prior proceeding, or the court finds that the remedy provided by such prior proceeding was inadequate or ineffective to test the validity of the order.

2. Sections 242 and 243 of the same Act, 66 Stat. 208-214, 8 U.S.C. 1252, 1253, provide in pertinent part:

APPREHENSION AND DEPORTATION OF ALIENS

Sec. 242. (a) Pending a determination of deportability in the case of any alien as provided in

subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. * * *

(b) A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation. Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present, unless by reason of the alien's mental incompetency it is impracticable for him to be present, in which case the Attorney General shall prescribe necessary and proper safeguards for the rights and privileges of such alien. If any alien has been given a reasonable opportunity to be present at a proceeding under this section, and without reasonable cause fails or refuses to attend or remain in attendance at such proceeding, the special inquiry officer may proceed to a determination in like manner as if the alien were present. In any case or class of cases in which the Attorney General believes that such procedure would be of aid in making a determination, he may require specifically or by regulation that an additional immigration officer shall be assigned to present the evidence on behalf of the United States and in such case such additional immigration officer shall have authority to present evidence, and to interrogate, examine and cross-examine the alien or other witnesses in the proceedings. Nothing in the preceding sentence shall be construed to diminish

the authority conferred upon the special inquiry officer conducting such proceedings. No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe. Such regulations shall include requirements that—

(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section. In any case in which an alien is ordered deported from the United States under the provisions of this Act, or of any other law or treaty, the decision of the

Attorney General shall be final. In the discretion of the Attorney General, and under such regulations as he may prescribe, deportation proceedings, including issuance of a warrant of arrest, and a finding of deportability under this section need not be required in the case of any alien who admits to belonging to a class of aliens who are deportable under section 241 if such alien voluntarily departs from the United States at his own expense, or is removed at Government expense as hereinafter authorized, unless the Attorney General has reason to believe that such alien is deportable under paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of section 241(a). If any alien who is authorized to depart voluntarily under the preceding sentence is financially unable to depart at his own expense and the Attorney General deems his removal to be in the best interest of the United States, the expense of such removal may be paid from the appropriation for the enforcement of this Act.

(c) When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detained, released on bond in an amount and containing such conditions as the Attorney General may prescribe, or released on such other condition as the Attorney General may prescribe. * * *

(d) Any alien, against whom a final order of deportation as defined in subsection (c) heretofore

or hereafter issued has been outstanding for more than six months, shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General. * * *

(e) Any alien against whom a final order of deportation is outstanding by reason of being a member of any of the classes described in paragraphs (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of section 241(a), who shall willfully fail or refuse to depart from the United States within a period of six months from the date of the final order of deportation under administrative processes, or, if judicial review is had, then from the date of the final order of the court, or from the date of the enactment of the Subversive Activities Control Act of 1950, whichever is the later, or shall willfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure, or who shall connive or conspire, or take any other action, designed to prevent or hamper or with the purpose of preventing or hampering his departure pursuant to such order of deportation, or who shall willfully fail or refuse to present himself for deportation at the time and place required by the Attorney General pursuant to such order of deportation, shall upon conviction be guilty of a felony, and shall be imprisoned not more than ten years: * * *

(f) Should the Attorney General find that any alien has unlawfully reentered the United States after having previously departed or been deported pursuant to an order of deportation, whether before or after the date of enactment of this Act, on any ground described in any of the paragraphs enumerated in subsection (e), the previous order

of deportation shall be deemed to be reinstated from its original date and such alien shall be deported under such previous order at any time subsequent to such reentry. For the purposes of subsection (e) the date on which the finding is made that such reinstatement is appropriate shall be deemed the date of the final order of deportation.

* * *

COUNTRIES TO WHICH ALIENS SHALL BE DEPORTED; COST OF DEPORTATION

Sec. 243. (a) The deportation of an alien in the United States provided for in this Act, or any other Act or treaty, shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States. No alien shall be permitted to make more than one such designation, nor shall any alien designate, as the place to which he wishes to be deported, any foreign territory contiguous to the United States or any island adjacent thereto or adjacent to the United States unless such alien is a native, citizen, subject, or national of, or had a residence in such designated foreign contiguous territory or adjacent island. If the government of the country designated by the alien fails finally to advise the Attorney General within three months following original inquiry whether that government will or will not accept such alien into its territory, such designation may thereafter be disregarded. Thereupon deportation of such alien shall be directed to any country

of which such alien is a subject national, or citizen if such country is willing to accept him into its territory. If the government of such country fails finally to advise the Attorney General or the alien within three months following the date of original inquiry, or within such other period as the Attorney General shall deem reasonable under the circumstances in a particular case, whether that government will or will not accept such alien into its territory, then such deportation shall be directed by the Attorney General within his discretion and without necessarily giving any priority or preference because of their order as herein set forth either—

(1) to the country from which such alien last entered the United States;

(2) to the country in which is located the foreign port at which such alien embarked for the United States or for foreign contiguous territory;

(3) to the country in which he was born;

(4) to the country in which the place of his birth is situated at the time he is ordered deported;

(5) to any country in which he resided prior to entering the country from which he entered the United States;

(6) to the country which had sovereignty over the birthplace of the alien at the time of his birth; or

(7) if deportation to any of the foregoing places or countries is impracticable, inadvis-

able, or impossible, then to any country which is willing to accept such alien into its territory.

* * *

(h) The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason.

3. Section 244 of the same Act, 66 Stat. 214, 8 U.S.C. 1254, provided at the time of the deportation proceedings here involved:

SUSPENSION OF DEPORTATION; VOLUNTARY DEPARTURE

Sec. 244. (a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who—

(1) applies to the Attorney General within five years after the effective date of this Act for suspension of deportation; last entered the United States more than two years prior to the date of enactment of this Act; is deportable under any law of the United States and is not a member of a class of aliens whose deportation could not have been suspended by reason of section 19 (d) of the Immigration Act of 1917, as amended; and has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose

deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence; or

(2) last entered the United States within two years prior to or at any time after the date of enactment of this Act; is deportable under any law of the United States solely for an act committed or status existing prior to or at the time of such entry into the United States and is not within the provisions of paragraph (4) of this subsection; was possessed of all of the requisite documents at the time of such entry into the United States; has been physically present in the United States for a continuous period of not less than five years immediately preceding his application under this paragraph, and proves that during all of such period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this Act in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence; or

(3) last entered the United States within two years prior to, or at any time after the date of enactment of this Act; is deportable under any law of the United States for an act committed or status acquired subsequent to such

entry into the United States and is not within the provisions of paragraph (4) or (5) of this subsection; was possessed of all of the requisite documents at the time of such entry into the United States; has been physically present in the United States for a continuous period of not less than five years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this Act in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence; or

(4) last entered the United States within two years prior to, or at any time after the date of enactment of this Act; is deportable under paragraph (1) of section 241 (a) insofar as it relates to criminals, prostitutes or other immoral persons, subversives, violators of narcotic laws and similar classes or under paragraph (2) of section 241 (a), as a person who entered the United States without inspection or at a time or place other than as designated by the Attorney General, or without the proper documents and is not within the provisions of paragraph (5) of this subsection; has been physically present in the United States for a continuous period of not less than ten years after such

entry and immediately preceding his application under this paragraph and proves that during all of such period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this Act in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence; or

(5) is deportable under paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17) or (18) of section 241 (a) for an act committed or status acquired subsequent to such entry into the United States or having last entered the United States within two years prior to, or at any time after the date of enactment of this Act, is deportable under paragraph (2) of section 241 (a) as a person who has remained longer in the United States than the period for which he was admitted; has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this Act in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation

would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence.

(b) Upon application by any alien who is found by the Attorney General to meet the requirements of paragraph (1), (2), or (3) of subsection (a) of this section, the Attorney General may in his discretion suspend deportation of such alien. If the deportation of any alien is suspended under the provisions of this subsection, a complete and detailed statement of the facts and pertinent provisions of law in the case, shall be reported to the Congress with the reasons for such suspension. Such reports shall be submitted on the first and fifteenth day of each calendar month in which Congress is in session. If during the session of of the Congress at which a case is reported, or, prior to the close of the session of the Congress next following the session at which a case is reported, either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien or authorize the alien's voluntary departure at his own expense under the order of deportation in the manner provided by law. If neither the Senate nor the House of Representatives shall, within the time above specified, pass such a resolution, the Attorney General shall cancel deportation proceedings. The provisions of this subsection relating to the granting of suspension of deportation shall not be applicable to any alien who is a native of any country contiguous to the United States or of any adjacent island,

unless he establishes to the satisfaction of the Attorney General that he is ineligible to obtain a nonquota immigrant visa.

(c) Upon application by any alien who is found by the Attorney General to meet the requirements of paragraph (4) or (5) of subsection (a) of this section, the Attorney General may in his discretion suspend deportation of such alien. If the deportation of any alien is suspended under the provisions of this subsection, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension. Such reports shall be submitted on the first and fifteenth day of each calendar month in which Congress is in session. If during the session of the Congress at which a case is reported, or, prior to the close of the session of the Congress next following the session at which a case is reported, the Congress passes a concurrent resolution stating in substance that it favors the suspension of such deportation, the Attorney General shall cancel deportation proceedings. If within the time above specified the Congress does not pass such a concurrent resolution, or if either the Senate or House of Representatives passes a resolution stating in substance that it does not favor the suspension of the deportation of such alien, the Attorney General shall thereupon deport such alien in the manner provided by law.

(d) Upon the cancellation of deportation in the case of any alien under this section, the Attorney General shall record the alien's lawful admission for permanent residence as of the date the cancellation of deportation of such alien is

made, and the Secretary of State shall, if the alien was classifiable as a quota immigrant at the time of entry and was not charged to the appropriate quota, reduce by one the quota of the quota area to which the alien is chargeable under section 202 for the fiscal year then current at the time of cancellation or the next following year in which a quota is available. No quota shall be so reduced by more than 50 per centum in any fiscal year.

(e) The Attorney General may, in his discretion, permit any alien under deportation proceedings, other than an alien within the provisions of paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of section 241 (a), (and also any alien within the purview of such paragraphs if he is also within the provisions of paragraph (4) or (5) of subsection (a) of this section), to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection.

4. Section 244 of the same Act, as amended by Public Law 87-885, approved October 24, 1962, § 4, 76 Stat. 1247 (8 U.S.C. [1958 ed., Supp. IV] 1254), now provides:

Sec. 244. (a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and—

(1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence; or

(2) is deportable under paragraphs (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of section 241 (a); has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

(b) The requirement of continuous physical presence in the United States specified in paragraphs (1) and (2) of subsection (a) of this section shall not be applicable to an alien who (A) has served for a minimum period of twenty-four

months in an active-duty status in the Armed Forces of the United States and, if separated from such service, was separated under honorable conditions, and (B) at the time of his enlistment or induction was in the United States.

(c) (1) Upon application by any alien who is found by the Attorney General to meet the requirements of subsection (a) of this section the Attorney General may in his discretion suspend deportation of such alien. If the deportation of any alien is suspended under the provisions of this subsection, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension. Such reports shall be submitted on the first day of each calendar month in which Congress is in session.

(2) In the case of an alien specified in paragraph (1) of subsection (a) of this section—

if during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien or authorize the alien's voluntary departure at his own expense under the order of deportation in the manner provided by law. If, within the time above specified, neither the Senate nor the House of Representatives shall pass such a resolution, the Attorney General shall cancel deportation proceedings.

(3) In the case of an alien specified in paragraph (2) of subsection (a) of this section—

if during the session of the oCngress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, the Congress passes a concurrent resolution stating in substance that it favors the suspension of such deportation, the Attorney General shall cancel deportation proceedings. If within the time above specified the Congress does not pass such a concurrent resolution, or if either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of the deportation of such alien, the Attorney General shall thereupon deport such alien in the manner provided by law.

(d) Upon the cancellation of deportation in the case of any alien under this section, the Attorney General shall record the alien's lawful admission for permanent residence as of the date the cancellation of deportation of such alien is made, and the Secretary of State shall, if the alien was classifiable as a quota immigrant at the time of entry and was not charged to the appropriate quota, reduce by one the quota of the quota to which the alien is chargeable under section 202 for the fiscal year then current at the time of cancellation or the next following year in which a quota is available. No quota shall be so reduced by more than 50 per centum in any fiscal year.

(e) The Attorney General may, in his discretion, permit any alien under deportation proceedings, other than an alien within the provisions of paragraph (4), (5), (6), (7), (11), (12), (14),

(15), (16), (17), or (18) of section 241 (a) (and also any alien within the purview of such paragraphs if he is also within the provisions of paragraph (2) of subsection (a) of this section), to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection.

(f) No provision of this section shall be applicable to an alien who (1) entered the United States as a crewman; or (2) was admitted to the United States pursuant to section 101(a)(15)(J) or has acquired such status after admission to the United States; or (3) is a native of any country contiguous to the United States or of any adjacent island named in section 101(b)(5): *Provided,* That the Attorney General may in his discretion agree to the granting of suspension of deportation to an alien specified in clause (3) of this subsection if such alien establishes to the satisfaction of the Attorney General that he is ineligible to obtain a nonquota immigrant visa.

II. Regulations

1. Part 3 of Title 8 of the Code of Federal Regulations (rev. 1958, Cum. Pocket Supp. as of January 1, 1963) provides in pertinent part:

PART 3—BOARD OF IMMIGRATION APPEALS

§ 3.1 *Board of Immigration Appeals*—(a) *Organization.* There shall be in the Department of Justice a Board of Immigration Appeals, which shall be under the supervision and direction of

the Attorney General and shall be responsible solely to him. * * *

(b) *Appellate jurisdiction.* Appeals shall lie to the Board of Immigration Appeals from the following:

* * *

(2) Decisions of special inquiry officers in deportation cases, as provided in Part 242 of this chapter.

* * *

(c) *Jurisdiction by certification.* The Commissioner, or any other duly authorized officer of the Service, or the Board may in any case arising under paragraph (b) of this section require certification of such case to the Board.

(d) *Powers of the Board—*

* * *

(2) *Finality of decision.* The decision of the Board shall be final except in those cases reviewed by the Attorney General in accordance with paragraph (h) of this section. * * *

* * *

(h) *Referral of cases to the Attorney General.* (1) The Board shall refer to the Attorney General for review of its decision all cases which:

(i) The Attorney General directs the Board to refer to him.

(ii) The Chairman or a majority of the Board believes should be referred to the Attorney General for review.

(iii) The Commissioner requests be referred to the Attorney General for review.

* * *

2. Parts 242 and 243 of Title 8 of the Code of Federal Regulations (rev. 1958) provided in pertinent part at the time of the enactment of Section 106 of the Immigration and Nationality Act, *supra*, pp. 57-61 (September 26, 1961):

PART 242—PROCEEDINGS TO DETERMINE DEPORTABILITY OF ALIENS IN THE UNITED STATES: APPREHENSION, CUSTODY, HEARING, AND APPEAL

§ 242.1 *Order to show cause and notice of hearing*—(a) *Commencement.* Every proceeding to determine the deportability of an alien in the United States is commenced by the issuance and service of an order to show cause * * *. * * *

(b) *Statement of nature of proceeding.* The order to show cause will contain * * * a concise statement of factual allegations informing the respondent of the acts or conduct alleged to be in violation of the law, and a designation of the charges against the respondent and of the statutory provisions alleged to have been violated. The order will require the respondent to show cause why he should not be deported. The order will call upon the respondent to appear before a special inquiry officer for hearing * * *. * * *

* * *

§ 242.14 *Evidence*—(a) *Sufficiency.* A determination of deportability shall not be valid unless based on reasonable, substantial, and probative evidence.

* * *

§ 242.16 *Hearing*—

* * *

(b) *Pleading by respondent.* The special inquiry officer shall require the respondent to plead

to the order to show cause by stating whether he admits or denies the factual allegations and his deportability under the charges contained therein. If the respondent admits the factual allegations and admits his deportability under the charges and the special inquiry officer is satisfied that no issues of law or fact remain, the special inquiry officer may determine that deportability as charged has been established by the admissions of the respondent.

(c) *Issues of deportability.* When deportability is not determined under the provisions of paragraph (b) of this section, the special inquiry officer shall request the assignment of an examining officer, and shall receive evidence as to any unresolved issues, except that no further evidence need be received as to any facts admitted during the pleading.

* * *

(e) *Application for discretionary relief* [as amended August 21, 1958, 23 F.R. 6543]. The respondent may apply during the hearing for suspension of deportation on Form I-256A, voluntary departure under section 244 of the act, or such other discretionary relief as may be appropriate to the case. The respondent has the burden of establishing his eligibility for discretionary relief and may submit evidence in support of his application.

§ 242.17 *Decision of special inquiry officer*— (a) *Contents.* The decision of the special inquiry officer may be oral or written. Except in cases where deportation is determined on the pleadings pursuant to § 242.16(b) or (d), the decision shall include a summary of the evidence and shall set forth findings of fact and conclusions of law as to deportability. * * * The decision shall also con-

tain a discussion of the evidence relating to the respondent's eligibility for any discretionary relief requested and the reasons for granting or denying the application. The decision shall be concluded with the order of the special inquiry officer.

* * *

(c) *Use of non-record information.* In determining an application for discretionary relief from deportation in proceedings under this part, the special inquiry officer may consider and rely upon information not contained in the record only when the Commissioner has determined that it is in the interest of national security and safety to do so.

§ 242.18 *Order of special inquiry officer.* The order of the special inquiry officer shall be that the alien be deported, or that the proceedings be terminated, or that the alien's deportation be suspended, or that the alien be granted voluntary departure at his own expense in lieu of deportation, with or without pre-examination, or any combination of these orders in the alternative or that such other action be taken in the proceedings as may be required for the appropriate disposition of the case.

* * *

§ 242.20 *Finality of order* [as amended November 14, 1958, 23 F. R. 9123, 9126]. The order of the special inquiry officer shall be final except when the case has been certified as provided in Part 3 or Part 103 of this chapter, or an appeal is taken to the Board of Immigration Appeals by the respondent or by the examining officer.

§ 242.21 *Appeals—*

* * *

(b) *Cases appealable* [as amended November 14, 1958, 23 F. R. 9123]. Pursuant to Part 3 of this chapter, an appeal shall lie from a decision of the special inquiry officer under this part to the Board of Immigration Appeals (except in cases covered by the provisions of § 242.20 relating to certifications). * * *

* * *

PART 243—DEPORTATION OF ALIENS IN THE UNITED STATES

§ 243.1 *Issuance of warrants of deportation; country to which alien shall be deported; cost of detention; care and attention of alien*—(a) *Issuance.* A warrant of deportation shall be based upon the final order of deportation and shall be issued by a district director or an immigration officer acting for him.

(b) *Determination of place and cost of deportation, and necessity for attendants.* District directors shall exercise the authority contained in section 243 of the Immigration and Nationality Act to designate the country to which, and at whose expense an alien in the United States shall be deported * * *.

§ 243.2 *Finality of decision.* No appeal shall lie from the decision of the district director in the exercise of the authority described in § 243.1.

§ 243.3 *Execution of warrants of deportation*—(a) *Taking alien into custody.* Upon the issuance of a warrant of deportation or as soon thereafter as the circumstances of the case require, the alien, if not in the physical custody of the Service, shall be taken into such custody under the authority of such warrant of deportation and deported.

(b) *Stay of deportation.* (1) Except as otherwise provided in this part, the district director having administrative jurisdiction over the place where the alien is located may, in the exercise of his discretion, and for good cause shown, stay the execution of a warrant and order of deportation for such time and under such conditions as he may deem appropriate. * * *

(2) If the request for a stay of deportation is predicated upon a claim by the alien that he would be subject to physical persecution if deported to the country designated by the Service, he shall be requested, upon notice, to appear before a special inquiry officer for interrogation under oath. The alien may have present with him, at his own expense, during the interrogation any attorney or representative authorized to practice before the Service. The alien may submit any evidence in support of his claim which he believes should be considered by the special inquiry officer. Upon completion of the interrogation, the special inquiry officer shall prepare a written memorandum of his findings and a recommendation which shall be forwarded to the regional commissioner together with all the evidence and information submitted by the alien or which may be applicable to the case. The alien shall be served with a copy of the special inquiry officer's memorandum and recommendation and shall be allowed five days from date of service within which to submit written representations to the regional commissioner. If the alien refuses to appear for interrogation before a special inquiry officer when requested to do so or waives his appearance, all the pertinent evidence and available information in the case shall immediately be submitted to the

regional commissioner. The decision whether to withhold deportation and, if so, for what period of time shall be finally made by the regional commissioner upon consideration of all the evidence submitted by the alien and any other pertinent evidence or available information.

(3) * * * No appeal shall lie from a denial of a request for a stay of deportation * * *.

* * *

3. Part 242 of Title 8 of the Code of Federal Regulations now provides in pertinent part (rev. 1958, Cum. Pocket Supp. as of January 1, 1963)—effective, except as otherwise indicated, since January 22, 1962 (26 F.R. 12112, 12114):

PART 242—PROCEEDINGS TO DETERMINE DEPORTABILITY OF ALIENS IN THE UNITED STATES: APPREHENSION, CUSTODY, HEARING, AND APPEAL

* * *

§ 242.17 *Ancillary matters, applications.*

(a) *Creation of the status of an alien lawfully admitted for permanent residence.* The respondent may apply to the special inquiry officer for suspension of deportation under section 244(a) of the Act, for adjustment of status under section 245 of the Act, or for creation of a record of lawful admission for permanent residence under section 249 of the Act; such applications shall be subject to the requirements contained in Parts 244, 245, and 249 of this chapter. The special inquiry officer shall inform the respondent of his apparent eligibility to apply for any of the benefits enumerated in this paragraph and shall afford him an opportunity to make application therefor during the hearing. In exercising discretionary

powers to grant or deny an application under this paragraph, the special inquiry officer may consider and rely upon information not contained in the record [illegible]vided the Commissioner has determined that it is in the interest of the national security and safety to do so.

(b) *Voluntary departure.* The respondent may apply to the special inquiry officer for voluntary departure in lieu of deportation pursuant to section 244(e) of the Act and Part 244 of this chapter.

(c) *Temporary withholding of deportation.* The special inquiry officer shall notify the respondent that if he is finally ordered deported his deportation will in the first instance be directed pursuant to section 243(a) of the Act to the country designated by him and shall afford the respondent an opportunity then and there to make such designation. The special inquiry officer shall then specify and state for the record the country, or countries in the alternate, to which respondent's deportation will be directed pursuant to section 243(a) of the Act if the country of his designation will not accept him into its territory, or fails to furnish timely notice of acceptance, or the respondent declines to designate a country. The respondent shall be advised that pursuant to section 243(h) of the Act he may apply for temporary withholding of deportation to the country or countries specified by the special inquiry officer and may be granted not more than ten days in which to submit his application. The application shall consist of respondent's statement setting forth the reasons in support of his request. The respondent shall be examined under oath on his application

and may present such pertinent evidence or information as he has readily available. The respondent has the burden of satisfying the special inquiry officer that he would be subject to physical persecution as claimed. The determination under section 243(h) of the Act may be based upon information not of record if, in the opinion of the special inquiry officer or the Board, the disclosure of such information would be prejudicial to the interests of the United States.

(d) *General.* An application under this section shall be made only during the hearing and shall not be held to constitute a concession of alienage or deportability in any case in which the respondent does not admit his alienage or deportability. The respondent shall have the burden of establishing that he is eligible for any requested benefit or privilege and that it should be granted in the exercise of discretion. * * *

§ 242.18 *Decision of special inquiry officer.*

(a) *Contents.* The decision of the special inquiry officer may be oral or written. Except when deportability is determined on the pleadings pursuant to § 242.16(b), the decision of the special inquiry officer shall include a discussion of the evidence and findings as to deportability. The formal enumeration of findings is not required. The decision shall also contain a discussion of the evidence pertinent to any application made by the respondent under § 242.17 and the reasons for granting or denying the request. The decision shall be concluded with the order of the special inquiry officer.

(c) *Order of the special inquiry officer.* The order of the special inquiry officer shall direct the respondent's deportation, or the termination of the proceedings, or such other disposition of the case as may be appropriate. When deportation is ordered, the special inquiry officer shall specify the country, or countries in the alternate, to which respondent's deportation shall be directed. The special inquiry officer is authorized to issue orders in the alternative or in combination as he may deem necessary.

* * *

§ 242.20 *Finality of order.*

The order of the special inquiry officer shall be final except when the case is certified to the Board as provided in Part 3 of this chapter or an appeal is taken to the Board by the respondent or the trial attorney.[35]

§ 242.21 *Appeals.*

Pursuant to Part 3 of this chapter an appeal shall lie from a decision of a special inquiry officer under this part to the Board of Immigration Appeals. * * *

---

[35] The substitution of the words "or the trial attorney" for "or by the examining officer" took effect as of September 29, 1962 (27 F.R. 9647).

APPENDIX B

EXCERPTS FROM THE CERTIFIED ADMINISTRATIVE RECORD

1. Decision and Order of the Special Inquiry Officer

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

September 19, 1961

File: A-15724917—New York, New York

IN DEPORTATION PROCEEDINGS

IN THE MATTER OF

FRANCESCO FOTI a/k/a FRANK FOTI, *Respondent*

CHARGES:

I & N Act—Section 241(a)(2)—Remained longer—Nonimmigrant seaman

APPLICATION: Suspension of Deportation (Immigration and Nationality Act—Section 244(a)(5));

Or—Voluntary Departure.

In behalf of Respondent:
JAMES J. CALLY, ESQ.
150 Broadway
New York 38, New York

In behalf of Service:
NO ONE.

DECISION OF SPECIAL INQUIRY OFFICER

The respondent is a 45-year-old married male alien, a native and citizen of Italy, who last entered the United States at Norfolk, Virginia, on or about November 16, 1950, at which time he was admitted as a nonimmigrant seaman, authorized to remain in the United States for the period of time his vessel remained in port, not exceeding 29 days. Deportability

is conceded and is found to be established on the charge contained in the Order To Show Cause.

The respondent is married and has a wife and three children residing in Italy. His closest relative in the United States is his brother, alleged to be a United States citizen. The respondent until about a month ago was employed as a baker, working for his brother, earning $60. per week. He is now self-employed. His assets in the United States total $4500., consisting of $3000. in savings, and miscellaneous personal property valued at $1500.

As the respondent is chargeable to a quota which is oversubscribed at the present time, he could not readily obtain an immigrant visa if granted the privilege of voluntary departure. A check of the appropriate local and federal records has failed to reveal an arrest or criminal record against him. Affidavits of witnesses have been produced, vouching for the respondent's good moral character for the preceding ten years. A bank book, employment affidavit, affidavits of witnesses, and other documentary evidence have been submitted, on the basis of which a finding is warranted that the respondent has been continously physically present in the United States for at least the preceding ten years.

The respondent claims that his deportation would result in exceptional and extremely unusual hardship to himself because it will be difficult for him to earn a living for his family in Italy. In view of the fact that the Immigration and Nationality Act was intended to limit suspension of deportation to those cases in which the deportation of the alien would be considered unconscionable (Report of Senate Committee, January 29th, 1952, Calendar 1072, Page 25), the hardship to the respondent is not considered to meet this exacting requirement. Consequently he is considered to be ineligible for suspension of deportation.

Even if it be assumed for the purpose of this decision that the respondent meets the minimum statutory requirement for eligibility for suspension of deportation under the Immigration and Nationality Act, nevertheless as a matter of administrative discretion that privilege should not be extended to him. In view of the fact that he has resided in the United States barely in excess of the minimum ten year requirement, that his wife and children reside abroad, and that there are no outstanding equities in his favor, he does not merit the privilege of suspension of deportation. However, since he has resided in this country for over ten years, he should be afforded an opportunity to effect voluntary departure for which relief he is eligible. Upon his failure to depart when and as required, he should be deported. He has specified Italy as the country to which he prefers to be deported.

ORDER:

IT IS ORDERED that in lieu of an order of deportation respondent be GRANTED VOLUNTARY DEPARTURE without expense to the Government, within such time and under such conditions as the District Director shall direct.

IT IS FURTHER ORDERED that if the respondent fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following order shall thereupon become immediately effective: respondent shall be deported from the United States in the manner provided by law, on the charge contained in the Order To Show Cause.

HENRY I. MILLMAN
Henry I. Millman
Special Inquiry Officer

2. District Director's Direction to Foti to Effect His Voluntary Departure on or Before December 18, 1961

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

20 West Broadway
New York 7, N. Y.
November 29, 1961

Please Refer to This File Number
A15 724 917 DB

Francisco Foti
72-18 18th Avenue c/o Suraca
Brooklyn, N. Y.

Dear Sir:

Please note the below checked action which has been taken in your case.

In accordance with a decision made in your case you are required to depart from the United States at your own expense on or before December 18, 1961.

You must notify this office on or before December 13, 1961 of the arrangements you have made to effect your departure, including the date, place and manner.

☒ Failure to depart on or before the specified date may result in the withdrawal of voluntary departure and steps being taken to effect your deportation.

If you are unable to depart by the date stated above, an additional period of time may be granted if, prior to the above date, you appear at this office with confirmed arrangements for your departure.

WHEN YOU APPEAR IN PERSON ON DECEMBER 13, 1961 BRING IN YOUR ITALIAN PASSPORT.

Very truly yours,

P. A. ESPERDY
District Director

By MASIL J. MASON
Supervisory Deportation Officer

cc: James J. Cally, Esq.
150 B'way, NYC

3. Notice to Foti of Country of Deportation in Event of His Failure to Depart Voluntarily

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

NOTICE TO ALIEN OF COUNTRY TO WHICH HIS DEPORTATION HAS BEEN DIRECTED AND PENALTY FOR REENTRY WITHOUT PERMISSION

File No.: A15 724 917

Francisco Foti
74-11 18th Avenue
Brooklyn, N. Y.

Date: 11/29/61

Dear Sir:

In the event that you should fail to depart voluntarily within the time authorized then, pursuant to the order of deportation in your case and Section 243 of the Immigration and Nationality Act, your deportation to Italy has been directed. You should arrange your personal affairs accordingly.

After deportation, unless the Attorney General has expressly consented to your reapplying for admission, if you enter, attempt to enter, or are at any time found in the United States, you will be guilty of a felony, and, upon conviction thereof, be punished by imprisonment of not more than two years, or by a fine of not more than $1,000, or both.

Very truly yours,

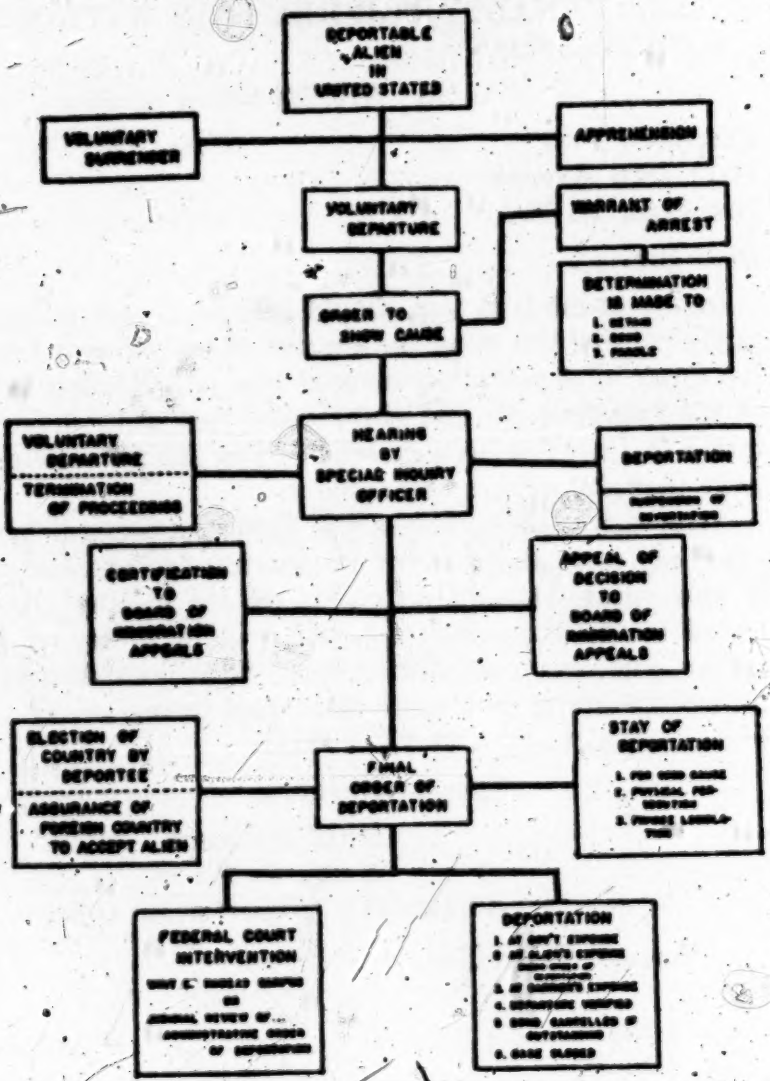
Masil J. Mason
MASIL J. MASON
Supervisory Deportation Officer

cc: James J. Cally, Esq.
FL/rs
Form I-294
(Rev. 6-10-58)

APPENDIX C

Chart outlining administrative procedures in deportation cases, as reproduced in H. Rep. 423, 86th Cong., 1st sess., p. 20, and H. Rep. 565, 87th Cong., 1st sess., p. 27 (see *supra*, pp. 28-29):

Deportation Case Procedures



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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 28

FRANCESCO FOTI, a/k/a FRANK FOTI, *Petitioner,*

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF ASSOCIATION OF IMMIGRATION AND NATIONALITY LAWYERS, AMICUS CURIAE

JACK WASSERMAN,
DAVID CARLINER,
Warner Building,
Washington 4, D. C.,
Attorneys for Association of Immigration and Nationality Lawyers Amicus Curiae.

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Rubinstein v. *Brownell*, 206 F. 2d 449, affirmed 346 U.S. 929 (1953)	5
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United States v. *Missouri Pacific P.R. Co.*, 278 U.S. 269 (1928) 11

Statutes and Regulations:

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66 Stat. 163, as amended 2
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Code of Federal Regulations:

8 C.F.R. 242.18 (1963 Supp.) 8
8 C.F.R. 243 (1963 Supp.) 6

Congressional Materials:

H. Doc. 329. 84th Cong., 2nd Sess. 5
H. R. 9182, 84th Cong. 5
H. R. 507, 85th Cong. 5
H. R. 12487, 85th Cong. 5
H. R. 13311, 85th Cong. 5
H. R. 2807, 86th Cong. 6
H. Rept. 2478, 85th Cong. 6
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Annual Report of Proceedings of the Judicial Conference of the United States (1959), p. 8	6
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IMMIGRATION AND NATURALIZATION SERVICE, *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF ASSOCIATION OF IMMIGRATION AND NATIONALITY LAWYERS, AMICUS CURIAE

Statement of Interest

A motion is now pending before this Court to authorize the filing of this amicus curiae brief.

The Association of Immigration and Nationality Lawyers is a national organization chartered under the laws of the State of New York. Its members are attorneys specializing in immigration, naturalization and nationality matters. Our interest in supporting the views of the majority of the

Second Circuit in the decision below, 308 F. 2d 779, prompts us to file this brief.

Statutory Provisions Involved

Section 106 of the Immigration and Nationality Act of 1952, as amended [75 Stat. 651, U.S.C. 1105(a), Supp. IV 1958 Ed.], provides:

> "JUDICIAL REVIEW OF ORDERS OF DEPORTATION AND EXCLUSION. Section 106(a). The procedure prescribed by, and all the provisions of the Act of December 29, 1950, as amended (64 Stat. 1129; 68 Stat 961, 5 U.S.C. 1031, et seq.) shall apply to, and shall be the sole and exclusive procedure for the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under Section 242 (b) of this Act or comparable provisions of any prior Act * * *."

Question Presented

Is the original jurisdiction of the Circuit Court of Appeals limited to final orders of deportation under Section 106 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1105(a) or does it encompass any and all types of orders entered in a deportation proceeding including denials of voluntary departure, adjustment of status, stays of deportation, and/or denials of suspension of deportation?

Statement

Petitioner, a native of Italy, remained in the United States longer than permitted as a seaman on December 16, 1950 (R.1-2). On June 9, 1961, he was accorded a deportation hearing pursuant to 8 U.S.C. 1252(b). His deportability was conceded. On September 19, 1961, a special

inquiry officer denied his application for suspension of deportation pursuant to 8 U.S.C. 1254(a)(5) but granted his alternative request for voluntary departure under 8 U.S.C. 1254(e). Provision was made in the order for withdrawal of the privilege of voluntary departure without notice upon failure to depart when required and for deportation according to law. (Govt. Brief, Appendix B, pp. 89-90.)

An appeal from this decision was dismissed by the Board of Immigration Appeals on November 28, 1961 (R. 1-3). On November 29, 1961, a notice was issued for petitioner to depart on or before December 18, 1961. This notice further stated:

> "Failure to depart on or before the specified date may result in the withdrawal of voluntary departure and steps being taken to effect your deportation." (Govt. Brief Appendix B, p. 92)

An additional notice served the same day advised petitioner that he would be deported to Italy if he failed to depart within the authorized time (Govt. Brief, Appendix B, p. 93). No notice was ever served indicating that the privilege of voluntary departure had been withdrawn, nor does any notation to that effect appear in the file.

Judicial review sought in the District Court on December 15, 1961, was denied for lack of jurisdiction (R. 6). Thereafter, this proceeding to review the denial of suspension of deportation was instituted in the Court of Appeals on January 15, 1962 (R. 4-6). By a 5-4 decision, the Court of Appeals dismissed the petition for lack of jurisdiction (R. 7-36, 308 F. 2d 779). The matter is here on certiorari to the Second Circuit.

Summary of Argument

The petitioner has not yet forfeited his right to voluntary departure under the District Director's letter of November 29, 1961. Under the circumstances, there is no effective order of deportation which can be reviewed.

The term "final order of deportation" is a term of art as stated by the Court below. It appears frequently in the Immigration and Nationality Act of 1952 and should have the same meaning throughout. This meaning, well recognized prior to the judicial review statute, does not encompass denials of supension of deportation. It does not include all matters arising in a deportation hearing. Neither the legislative history nor the Committee reports require alterations of the well-recognized meaning ascribed to a "final order of deportation". The decision below, therefore, correctly concluded that it had no original jurisdiction to review an order denying suspension of deportation.

ARGUMENT

I

Historical Background of Statutory Review Provisions of Deportation Orders

In *McGrath* v. *Kristensen*, 340 U.S. 162 (1950), this Court upheld judicial review of a denial of suspension of deportation where no final order of deportation had been rendered. Kristensen had been granted voluntary departure without an order of deportation. The Government, opposing judicial review, had argued unsuccessfully that:

> "The Immigration Act of 1917 provides that the decision of the Attorney General in alien deportation cases shall be 'final'. This has long been held to mean

> that deportation orders are subject only to limited collateral review afforded by habeas corpus proceedings." (Govt. Brief, p. 11)

Thereafter, in *Heikkila* v. *Barber*, 345 U.S. 229 (1953), this Court held that under the 1917 Immigration Act giving finality to administrative orders of deportation Court review was limited to habeas corpus. Under the 1952 Immigration and Nationality Act, however, deportation orders were held to be reviewable in declaratory judgment actions. *Shaughnessy* v. *Pedreiro*, 349 U.S. 48 (1954).

On September 24, 1953, Attorney General Brownell reported to the Judicial Conference of the United States that in view of the conflict between *Heikkila* v. *Barber*, *supra*, and *Rubinstein* v. *Brownell*, 206 F. 2d 449 (prior to its affirmance in 346 U.S. 929), that:

> "we think Congress should spell out a method of obtaining judicial review in the district court for any alien against whom a final order of deportation has issued, whether he is in custody or not."

On February 8, 1956, President Eisenhower called for legislation (H. Doc. 329, 84th Cong., 2nd Sess.) and the draft of a bill was transmitted to Congress by Attorney General Rogers on that day providing for judicial review of deportation orders in the district court. S. 3169 and H.R. 9182 were introduced in the 84th Congress embodying this recommendation. Similar bills, S. 345 and H.R. 507 were introduced in the 85th Congress.

H.R. 12487, 85th Congress, for the first time vested original jurisdiction in the Court of Appeals to review final orders of deportation. This was supplanted by H.R. 13311 which was the subject of hearings on July 10, 1958, before the House Subcommittee on Immigration. The bill was sup-

ported by the Department of Justice and opposed by the American Bar Association, the Association of Immigration and Nationality Lawyers, and others. The bill was favorably reported, H. Rept. 2478, 85th Cong., 2nd Sess. It was reintroduced as H.R. 2807, 86th Cong., and favorably reported again in H. Rept. 423. Judge Biggs, the author of *Lam Man Chi* v. *Bouchard*, 314 F. 2d 664 (C.A. 3, 1963), which follows the decision below, reported H.R. 2807 favorably to the Judicial Conference of the United States in September, 1959, and secured its endorsement. *1959 Annual Report of Proceedings of the Judicial Conference of the United States*, p. 8.

The bill finally emerged in the 87th Congress as S. 2237 (H. Rept. 1086) and became Public Law 87-301.

II

The Deportation Order Herein Is Not Final

Judicial review by the mandate of the statute applies only to final orders of deportation. Petitioner has been directed to leave the United States without an order of deportation. Although the date of voluntary departure has expired (December 18, 1961), there is nothing in the record to show that the privilege of voluntary departure has been withdrawn or forfeited in conformity with the District Director's letter of November 29, 1961 (Govt. Brief, Appendix B, p. 92).

> "Failure to depart within the allotted time may forfeit the privilege." *Gordon and Rosenfield, Immigration Law and Procedure*, p. 710.

Normally, when an order of deportation becomes effective, upon an alien's failure to depart, a warrant of deportation is issued. 8 C.F.R. 243.2. Until the issuance of a warrant

of deportation, the District Director is authorized to extend the period of voluntary departure. In the instant case, it cannot be said that the order of deportation is presently in force and therefore subject to review.

III

The Term "Final Order of Deportation" Is a Term of Art and Does Not Refer to Denials of Suspension of Deportation or Other Rulings in a Deportation Case.

We submit that the Court of Appeals correctly observed that the words "final order of deportation" were a term of art. The 1952 Immigration and Nationality Act repeatedly utilizes these words.

1. Section 242(b), 8 U.S.C. 1252(b), authorizes a special inquiry officer to make "determinations including orders of deportation".

2. Section 242(c), 8 U.S.C. 1252(c), gives the Attorney General authority to detain an alien for six months after a "final order of deportation".

3. Section 242(d), 8 U.S.C. 1252(d), authorizes supervision of any alien against whom a "final order of deportation" has been outstanding.

4. Section 242(e), 8 U.S.C. 1252(e), provides criminal sanctions for aliens in certain categories who delay their deportation after entry against them of a "final order of deportation".

5. Section 242(f), 8 U.S.C. 1252(f), provides for the reinstatement of the previous "order of deportation" of an alien unlawfully reentering after deportation.

6. Section 244(a)(2), (3), (4), 8 U.S.C. 1254(a)(2), (3), (4) [prior to 1962 amendment by Public Law 87-885], contained three provisions for suspension of deportation for

aliens who have not "been served with a final order of deportation issued pursuant to this Act".

7. Section 405(a), 8 U.S.C. 1101, note, provides for continuing validity of outstanding "orders or warrants of deportation" on the effective date of the Act.

In addition to the foregoing, the regulations of the Immigration Service contain provisions relating to final orders of deportation, 8 C.F.R. 243 (1963 Supp.).

A final order of deportation is one which has achieved administrative finality, *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, 52 (1954).

A special inquiry officer may enter an order of deportation or any other order he is authorized to make including the grant or denial of suspension of deportation. 8 U.S.C. 1242(b), 8 C.F.R. 242.18 (1963 Supp.)

The Court below appropriately observed, 308 F. 2d at 781:

> "When Congress, in 1961, gave the Courts of Appeals jurisdiction to review 'final orders of deportation' * * * made against aliens within the United States pursuant to administrative proceedings under Section 242(b) of this Act or comparable provisions of any prior Act; it was thus using a term of art which had been used repeatedly in § 242 and possessed a well-understood meaning."

A final order of deportation had a well-defined meaning among officials of the Immigration Service and with immigration practitioners. It was not an order granting or denying suspension of deportation, it was not one relating to voluntary departure, adjustment of status, registry, stay of deportation, denial of a visa petition, or of a waiver.

See *Wasserman, Immigration Law and Practice* (1961), p. 131.

When Congress confined original review jurisdiction in the Court of Appeals to final orders of deportation, it did not include all ancillary orders which may now be entered in a deportation hearing. As Mr. Justice Holmes said in *United States* v. *Atchison T. & S. F. R. Co.*, 220 U.S. 37 (1910):

> "We see no reason to suppose that Congress meant more than it said."

Congress might have vested the Court of Appeals with jurisdiction to review all orders entered in a deportation hearing, including orders of voluntary departure and those disposing of a suspension application. Instead, it restricted review to final orders of deportation in legislation carefully drafted and reviewed by the Department of Justice.

> "* * * where words are employed in an act which had at the time a well known meaning in the law, they are used in that sense unless the context requires the contrary." *Case* v. *Los Angeles Lumber Products*, 308 U.S. 106, 115 (1939).

It should also be noted that it is fair to assume that the words "final order of deportation", "were employed by the Congress throughout the Act in the same and not different senses." *United States* v. *Cooper Corp.*, 312 U.S. 600, 607 (1940).

Finally, we conclude as this Court did in *Barber* v. *Gonzales*, 347 U.S. 637 at 643 (1953):

> "In the absence of explicit language showing a contrary congressional intent, we must give technical words in deportation statutes their usual technical meaning."

Giving the words "final order of deportation" their usual technical meaning requires an affirmation of the majority opinion below.

IV

The Statute Requires Substantial and Probative Evidence to Support Findings of the Attorney General

Section 106(a)(4), 8 U.S.C. 1105(a)(4), Supp. IV, 1958 Ed., requires that:

> "The petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial and probative evidence on the record considered as a whole, shall be conclusive * * *."

If the suspension denial is an integral and inseparable part of the deportation order, as contended by the respondent, and if it is reviewable initially in the Court of Appeals, then it should be tested by the substantial evidence rule set forth above. However, there is nothing in the legislative history to show that Congress planned to overturn *Jay* v. *Boyd*, 351 U.S. 345 (1955), holding that confidential information could be utilized in denying suspension of deportation. We believe that the Court below correctly decided on this basis that the statute was not drafted to review denials of suspension orders.

V

Neither the Committee Reports Nor the Congressional Debates Require Reversal of the Decision Below

The bill which became law was S. 2237 of the 87th Congress. Reliance is placed by the Government not on Congressional debates relating to this bill but to predecessor bills. Assuming that such debates have some persuasive force, it is said that they clarify the meaning of "final orders of deportation" and change the term to include "all questions which may arise in a deportation proceeding".

The words "final order of deportation" are neither doubtful nor obscure. Explanatory statements of members of Congress in charge cannot be considered under these circumstances as an aid in construction. *Railroad Commission* v. *Chicago B. & Q. R. Co.*, 257 U.S. 563, 589 (1921). Where language is clear, as here, the words employed are to be taken as the final expression of the meaning intended. *United States* v. *Missouri Pacific R.R. Co.*, 278 U.S. 269, 277 (1928).

Moreover, the debates reveal a surprising lack of familiarity with deportation procedures by Congressman Moore (Govt. Brief, pp. 32, 33, note 19), one of the main sponsors of the bill and the author of one of the supporting Committee reports. H. Rept. 423, 86th Cong., 1st Sess.

The last mentioned report, at page 20, contains the chart relied upon so heavily by the Government (Govt. Brief, p. 28). Obviously, the chart had no impact upon Congressman Moore who believed, as the Government acknowledges, that a suspension application was made after entry of a final deportation order. It is obvious, therefore, that this chart did not play a major role in the passage of S. 2237 in a subsequent session of Congress.

We submit that the views of Judge Biggs, who approved and sponsored this legislation in the Judicial Conference are more persuasive. In *Lam Man Chi* v. *Bouchard*, 314 F. 2d 663, 673, 674 (C.A. 3, 1963), he stated:

> "The express language of the statute is such that to interpret as has been suggested requires judicial legislation of such a sweeping and broad kind as to be virtually impossible."

Conclusion

We submit that the decision below was clearly justified in interpreting the judicial review statute to limit original Court of Appeals jurisdiction to final orders of deportation and in not including all matters arising in a deportation proceeding.

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